No. 18-281

In the
Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, M. KIRKLAND COX,

Appellants,

v.

GOLDEN BETHUNE-HILL, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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JOINT APPENDIX
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December 28, 2018

Jurisdictional Statement Filed September 4, 2018
Jurisdiction Postponed November 13, 2018

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BY MR. HAMILTON:

Q. Good afternoon, Delegate Jones.

A. Good afternoon.

Q. Nice to see you again.

A. Yes, sir, likewise.

Q. We have to keep—stop meeting like this.

A. I would agree with that.

Q. I bet. Let's just start with when you sat down to start with the process of redistricting, you were relying on census data, weren't you?

A. Census data that was inputted into the benchmark map, yes, sir.

[518] Q. That's census data provided by the United States government as part of the U.S. census that's done every ten years; right?

A. Correct.

Q. You relied on it to be accurate.

A. I did.

Q. You relied on it to draw lines on the maps; right?

A. Correct.

Q. That's the only data that we have in every state in this country to perform the necessary job of reapportionment; isn't that true?

A. That is correct.

Q. So you didn't have any questions about the reliability of this data when you sat down?

A. I did. In the beginning.

Q. Other than the one mistake that you caught and was fixed.

A Yes, but that didn't give me satisfaction that there weren't other mistakes. That was such a glaring error that occurred I knew something was wrong, because I lived in that area.

Q. Did you throw out the census data and start with a different set of data?

A. No. We had to use what was presented to us.

Q. So you had it, and you used it?

A. Yes.

[519] Q. Thank you, sir. Now, Mr. Morgan—I think you were described as the chief architect, Mr. Morgan was described as the carpenter of this plan. Do you agree with that? Is that an accurate description of your respective roles?

A. Yes. He would be the finish carpenter. I would probably be the guy that roughs the house in, and he would be the finish carpenter.

Q. This just keeps changing, doesn't it? So he would be doing the precinct splits, you would be doing the larger movements of entire VTDs or county-level material; is that right?

A. Yes, sir.

Q. And you know that below the level of VTDs, there's a whole bunch of little things called census blocks; right?

A. Yes.

Q. But you weren't, for the most part, paying attention to census blocks? I think you've testified

something, they're below your pay grade or not important enough?

A. There were over 2,600, I think, precincts. So that was enough to be contending with without worrying about the number of blocks that would be underneath those VTDs.

Q. So if we want to know why this VTD was split or specifically where—why it was split in the way that it was split, we have to asked Mr. Morgan.

A. With certain exceptions, yes.

[520] Q. Now, we just saw a video with Delegate Spruill. Did I hear you correctly to say that he still serves in the General Assembly?

A. He does.

Q. Right here in Richmond?

A. He served in the Senate.

Q. In the Virginia Senate?

A. Yes.

Q. So he could have come here and testified himself. No reason not to, right?

A. I can't speak for what he—he could have, yes. He would be able.

Q. He could have been served with a subpoena just like the other witnesses who testified; right?

A. Correct.

Q. You've been sitting in this courtroom since the beginning of this trial, haven't you, or most of the time?

A. Unfortunately, I have, yes, sir.

Q. He hasn't—he didn't testify, did he?

A. No.

Q. Let me direct your attention to—it's in the notebook, the witness notebook that's there in front of you. It's Plaintiffs' Exhibit 16. It's your reapportionment criteria.

A. Got it.

Q. Maybe we can blow up the first two numbered paragraphs, [521] population equality and the Voting Rights Act. Compliance with the one-person-one-vote principle and the Voting Rights Act were the two most important principles that drove the redistricting process; correct?

A. Correct.

Q. And so we can put aside right now any dispute—it is undisputed you considered race when you were drawing these districts because you had to; right?

A. Had to, yes, sir, absolutely.

Q. And these two criteria were nonnegotiable.

A. Yes, because, from our perspective, they would not pass DOJ muster, and the Constitution requires the population equality.

Q. And there were other factors that we can look at in this exhibit, but all of them would yield to these two, these two criteria because they're required by either the United States Constitution or the Voting Rights Act; correct?

A. Yes.

Q. And it's true that they did; so, for example, in the enacted plan 5005—in 5005, there were counties that were split; right?

A. Correct.

Q. Like Dinwiddie County, that was split?

A. Correct.

Q. Chesterfield County, that was split?

[522] A. Yes.

Q. Henrico, that was split a number of different ways?

A. Right.

Q. Cities, those were split. Like Hopewell, that was split; right?

A. Correct.

Q. And VTDs, we had a whole bunch of VTDs that were split all over the Commonwealth; correct?

A. Yes.

Q. Mr. Braden asked you something like—this isn't a direct quote, but there's nothing sacrosanct about VTDs, that they can be split if you need to; correct?

A. Correct.

Q. But there's a cost to splitting a VTD, isn't there, for the election administration? Election administrators have to print different ballots for that precinct, for one precinct on each side of that split because they're in different districts; isn't that true?

A. That's correct. A good example is Taylor Road precinct is now split. It wasn't split when we passed the plan. The city decided to split it because of something that they were doing. So now I have a split precinct.

Q. Right, and I'm sorry to interrupt, but the question is, there's a cost when you split a VTD. It imposes a burden, at least an administrative burden, on not only the election [523] administrators but the voters in those split precincts because they have to deal with complicated two-part ballots; right?

A. Yes.

Q. And so for that reason, we don't really—as you sat down, it wasn't one of your goals, hey, let's see how many VTDs we can split across the Commonwealth?

A. It exactly was the opposite. We tried to split less than we did from ten years before which I think we accomplished.

Q. Okay, thank you. So let's start with House District 63, and maybe we can display that map. Thank you. The incumbent here was Delegate Dance. This is Delegate Dance's district; is that right?

A. Yes.

Q. You testified a little bit earlier about this. Delegate Dance picked up this whole sort of northern arm, northeastern arm that went up; isn't that right?

A. She did.

Q. She picked up Hopewell, because I think you said that you dropped from House District 74; right?

A. Yes.

Q. But she only picked up part of it; right?

A. Right.

Q. She picked up the African-American part of it.

A. And the part that was previously in the 74th.

Q. Right. You could have respected the entire city [524] boundaries of the city of Hopewell and included it in one district or the other, but you chose to include half of the city; isn't that right?

A. I kept it as it was before the split, yes, sir.

Q. And that split was right along racial lines?

A. I don't know, but if you're telling me it is, I will assume you are correct.

Q. If we—I think I heard you say that one of the reasons that you moved Hopewell over from 74 was to fix a river crossing that had been addressed in the *Wilkins v. West* litigation. Did I hear you correctly?

A. I didn't say directly from *Wilkins v. West*. There comments that were made over the years—I served on the Privileges and Elections Committee my entire term, and, of course, after the redistricting in 2001 to the balance of the decade, we would have citizens who would come to our meetings and express their opinion.

Q. It was challenged in *Wilkins*—

A. It was, yes, sir.

Q. I think I heard you say the Supreme Court of Virginia affirmed the map as it was drawn including that river split; isn't that true?

A. I believe it was unanimous, yes, sir.

Q. So there certainly wasn't—the Supreme Court of Virginia—the Virginia Constitution didn't require you to fix [525] that, it was just something you felt you wanted to do.

A. Correct.

Q. There are other river splits in the map; right?

A. Yes.

Q. And that included the Appomattox River. There was a split between House District 62 and 63 over the Appomattox. That one didn't get fixed; correct?

A. Right.

Q. And there was also water crossings in House District 68, 70, and 80 in the final map. None of those got fixed, did they?

A. No. I think 69—69 particularly—

Q. The question was—

THE COURT: Y'all are talking over each other and neither the answer—I don't know that she got the question or the answer for the last one about whether it was fixed because there was talking in the middle about there being three bridges somewhere, and so maybe you better start again.

Q. There were river crossings in House District 68, 70, and 80 in the final map, and none of them were fixed; isn't that true?

A. That is true.

Q. Thank you, sir. And it's true that you used the 55 percent black voting-age population racial target in drawing House District 63; correct?

[526] A. The 55 percent goal was used in drawing—that was part of the criteria in looking at House District 63, correct.

Q. And it was used in drawing the district; right?

A. Delegate Dance—

Q. The question is a yes or no, sir.

A. Yes.

Q. Thank you. Other than what Delegate Dance may have said to you, you didn't do any other kind of analysis to determine whether that district, District 63, needed to have at least 55 percent black voting-age population in order to elect—for the African-American population to elect a candidate of their choice; correct?

A. No.

Q. That's not correct or it is correct?

A. It's not correct. I was aware, if I may, of her running, I think, as an independent back in 2001.

Q. That's not what I asked you. I said, other than what Delegate Dance may have said to you, you didn't do any other kind of analysis to determine whether it needed to have at least a 55 percent BVAP, did you?

A. No. Not an analysis.

Q. In the 2011 redistricting, District 63 was expanded into the northeast into the city of Hopewell and added precincts from Prince George County to address the under-population in District 63.

[527] A. Yes.

Q. Now, let's talk for a minute about this hook around the city of New Hope. I think you testified that the hook was drawn in order to draw out a potential primary opponent for Delegate Dance; is that correct?

A. That was my recollection, yes, sir.

Q. Because the logical thing to have done would have been to stay on the northwest side of I-85; correct?

A. I have to put it on the map.

MR. HAMILTON: Do we have a close-up?

Q. I don't have the location of I-85.

A. I assume, if I may, I assume it's here. Is that your question?

Q. The question is, the logical thing to have done would have been to stay on the northwest side of I-85; correct?

A. For House District 63?

Q. Yes.

A. Yes.

Q. Now, you don't know who this primary opponent was; right?

A. No, I had, over the years—several members asked me not to put certain precincts in their district over the years.

Q. But the question is, you don't know the name—as you sit here today, you can't tell us the name of who that was?

A. No.

Q. And you don't know where that person lived?

[528] A. No. I would assume, it being—I can't do that. I'm sorry.

Q. You didn't do any independent research or investigation to figure out who that person was or where they might live; that was just not a concern of yours.

A. No, I relied on the member.

Q. Now, this district also split Dinwiddie County; correct?

A. Correct.

Q. I believe the Court called that county split validly racial. Do you recall reading that in the opinion of this Court after the 2015 trial?

A. I do not.

Q. And you testified in the last trial that the outline of House District 63 along the Dinwiddie County split followed the I-85 line; do you recall that testimony?

A. I don't specifically recall, but I do believe it does follow 85.

Q. And you weren't saying that you drew the district to follow the I-85 line, were you? You were just simply providing a point of reference to the Court?

A. Correct, yes, sir.

Q. Because following roads isn't a traditional redistricting—

A. That's correct.

Q. Let's turn to House District 71. You mentioned a moment [529] ago that Richmond is no longer a majority black city; is that right.

A. Correct.

Q. The mayor of Richmond, as we sit here today, is Levar Stoney, a Democratic; isn't that true?

A. Correct.

Q. And the—he's African American?

A. Correct.

Q. And the mayor before him was Doug Wilder?

A. No.

Q. Dwight Jones?

A. Correct.

Q. Before him, Doug Wilder?

A. Correct.

Q. All of them African Americans?

A. Correct.

Q. When was, if you know, Doug Wilder first elected as mayor of Richmond?

A. They changed their charter. I think it would have been late '90s, early 2000s.

Q. Is it fair to say that from the late '90s, early 2000s until today, every mayor of Richmond has been an African-American Democrat?

A. Yes.

Q. And Dwight Jones was the mayor of Richmond at the time of [530] the 2011 redistricting?

A. I believe he would have had to have been. Yes, he was. He left the House, I think, in 2008 or 2009.

Q. All of them, every one of them elected from a city that, at least at this point, is not majority black.

A. Yes, but if you follow the last election, they put pressure on people who drop out of the race so—

Q. That's not my question. My question is, they were all elected from a city that's no longer majority black.

A. That's correct.

Q. And it goes without saying, then, that Richmond is not 55 percent black voting-age population as a city.

A. It is not.

Q. In any event, the final map, HB 5005, increased the black voting-age population of the House District 71 from about 46 percent to about 53 percent.

A. It restored it to where it was previously, I think, in the benchmark map.

Q. That's yes?

A. Yes, yes.

Q. Now, you testified that changes were made to House District 71 to make it more Richmond-centric; do you recall that?

A. I do.

Q. And the way that was done was by removing the three VTDs [531] in the northwest part of the district; that's Summit Court, Hilliard, and Stratford Hills; is that right?

A. That was part of it.

Q. And you also moved district—I'm sorry, VTD 207 over to Delegate Loupassi's district next door.

A. Right, I believe I moved 204 into 71.

Q. There's more than one way to make House District 71 more Richmond-centric; right? You could have left 207 in the district and added 113, 114, 112, or 105, or some combination of those, and those all would have made House District 71 more Richmond-centric; right?

A. You could have done it many different ways.

Q. And adding Ratcliffe, that's not even in the city of Richmond, is it?

A. No. She previously had part of Henrico County. She moved to the west—to the eastern side.

Q. So that certainly didn't make it more Richmond-centric. That actually went into Henrico County.

A. You are referencing my comment of Richmond-centric. I think the district is more Richmond-centric—

Q. Right, but this—

THE COURT: Wait a minute. You are talking over each—

THE WITNESS: And if I can please answer, Your Honor.

JUDGE PAYNE: Go ahead.

[532] THE WITNESS: Your question to me was about Richmond-centric and different ways that it could be drawn. I acknowledge that, but my opinion is it's more Richmond-centric than what it was before, and I think the map bears that out.

Q. In addition to the mayoral elections that we talked about, the incumbent here, Jennifer McClellan, has easily won reelection in every election she's run in; isn't that right?

A. That's correct.

Q. And I believe you said that it wasn't—in response to Mr. Braden's question a moment ago, you said it wasn't logical for this district to move to the west because that would have diluted the black voting-age population and threatened DOJ approval. That was your testimony?

A. Yes, sir, it was.

Q. So that is—there was a racial reason, or at least a racial composition reason, not to move it to the

west, because that would drop the BVAP levels too low, in your opinion?

A. I believe we heard that this morning from one of the experts.

JUDGE PAYNE: I think he's asking what your opinion was.

A. Yes.

Q. So part of the reason that it moved to the east was to increase the black voting-age population.

A. Yeah, restore it to where it was previous.

[533] Q. So here we can say for certainty the black—the express racial—55 percent racial target had an impact on the way this district was drawn.

A. Yes.

Q. Let's talk about 207 just for a minute. This is VTD 207 and House District 701. I think you testified, and maybe I misheard you, but I think you said VTD 207 is in The Fan, and VTD 113 and 114 is bordering The Fan in the Museum District. Did I hear you correctly?

A. Yes.

JUDGE PAYNE: He said it was House District 701?

MR. HAMILTON: I'm sorry, Your Honor. If I said that, I apologize. We're in House District 71.

JUDGE PAYNE: 71.

MR. HAMILTON: And we're discussing the movement of VTD 207.

Q. So we're in agreement, VTD 207 is part of The Fan district; correct?

A. Yes.

Q. And VTD 113 and 114 is not in The Fan district. That's in the Museum District; isn't it?

A. Yes.

Q. VTD 207 is, you'll agree with me, a very white, very Democratic neighborhood; correct?

A. It is.

[534] Q. It's about 92 percent white voting-age population; does that sound about right?

A. I do not know.

Q. So Delegate Loupassi, who was in the district next door—that's where 207 went, it went into Loupassi's district?

A. Yes.

Q. But it was a strong Democratic VTD; correct?

A. Correct.

Q. Leaving, at least just all other things to the side, just considering the political impact, leaving VTD 207 in House District 71 would have added—would have helped both Loupassi and McClellan from a share-of-the-vote perspective; correct?

A. Yes. You could make that argument, yes.

Q. And that VTD had always been in House District 71. This is a new change; right?

A. I'm not sure about always, but I believe since 1991.

Q. A long time?

A. A long time. I don't want to misspeak.

Q. I appreciate the concern for accuracy. At least 20 years?

A. Yes.

Q. Now, I won't go into this, but there was nothing in the transcripts of all those public hearings on the redistricting process mentioned anything about any of Delegate Loupassi's business interests in VTD 701; correct?

A. No, not that I'm aware of.

[535] Q. So we can save the Court a lot of time. The Court doesn't have to go through all the transcripts that are in the record, because there isn't going to be anything in there about that; right?

A. I don't think so, but I can't say that with 100 percent certainty.

Q. And the same thing is true, at the first trial of this matter, there's no mention of Delegate Loupassi and his business interests; correct?

A. No.

Q. Let's move to House District 70. This is Delegate McQuinn's district; is that right?

A. Yes.

Q. And in framing this district, race played a role; right?

A. Second criteria was to comply with the Voting Rights Act, and preclearance, so, yes.

Q. And in—you used the 55 percent black voting-age population target in deciding how to frame the district; right?

A. Yes, with population loss; correct.

Q. Now, in the adopted map, among other changes, District 70 gave up these three VTDs, and maybe we can take a closer look at that. It's 701, 702, and 703. Those districts were moved over from Delegate McClellan's district; is that right?

A. It's hard to see on this map, Your Honor. This dot or whatever you call this kind of map—

[536] JUDGE PAYNE: If you can't see, that's all right. Give him something he can he can see.

Q. How's that? A little better?

A. Yes, we would have moved 702, 701 I believe were moved, and 70—is that six or five? I can't tell by this map.

Q. 701 and 702, those are heavily African-American precincts; isn't that right?

A. They are.

Q. And then the other—one of the other big changes here is that District 70 expanded into the Chesterfield County with the addition of VTDs down at the bottom left-hand corner of the screen?

A. Yes, already had a precinct in Chesterfield, but, yes, it did expand—

JUDGE PAYNE: Where did you end up on whether HD 70 gave up 703 or 705? That's left up in the air. I don't know which one you are talking about.

MR. HAMILTON: The map is clear, Your Honor.

JUDGE PAYNE: I'm asking the witness.

THE WITNESS: 703 and 705 stayed in House District 70, Your Honor.

JUDGE PAYNE: 703 and 705 stayed in 70.

THE WITNESS: Yes, sir.

JUDGE PAYNE: That's your view. You take a different view, Mr. Hamilton?

[537] MR. HAMILTON: I believe 703 was split, Your Honor, and 701 and 702 and part of 703 moved into House District 70.

JUDGE PAYNE: His testimony is different than that.

Q. Delegate Jones, isn't it true 703 was split?

A. If you tell me it is, yes, sir. This map does not give a good representation. I apologize. I'm used to the yellow map with the hash tags. That would better for me to respond—

JUDGE PAYNE: Do you have that in front of you?

That's Defendant Intervenors' Exhibit 94, page what?

MR. HAMILTON: It's up on the—Exhibit 94, page three. It's the map displaying House District 70, and it's on the time screen.

A. It appears to me that 703 is split on the north side, yes.

MR. HAMILTON: Is that sufficiently clear, Your Honor?

JUDGE PAYNE: Yes.

Q. Maybe we can go back to the density map. Now, the incumbent here, I think you said, is Delegate McQuinn?

A. Yes.

Q. And she lived in VTD 705; is that right?

A. Yes, I believe that's correct. Right on the border, but, yes, 705, I think.

Q. So the location of her residential address didn't require keeping either Central Gardens or Masonic in the northern end of that turret. That wasn't necessary to keep those VTDs in [538] just because she lived down in VTD 705; right?

A. No, but she wanted them.

Q. Well, she also wanted 701, 702, and the northern—the western side of 703, didn't she?

A. That's correct.

Q. She didn't get to keep those?

A. Like probably all hundred members, they didn't get to keep everything they wanted.

Q. I think the Rolling Stones wrote a song about that. But in this case, the reason 701 and 702—

(Reporter interruption.)

Q. I'll omit the reference to the Rolling Stones and just start from the beginning.

THE COURT REPORTER: I got that part.

Q. The reason that 701, 702, and part of 703 moved over to the west was in order to increase the black voting-age population of Delegate McClellan's district, District 71; correct?

A. Yes and no. Yes, but also for additional population that was needed for the district.

Q. So served both purposes at once?

A. It did, yes, sir.

Q. Because you could have picked up population in a number of [539] different areas, but this was the densest population of African Americans to move.

A. Very similar to 602 which is adjacent to it. It appears on the map anyway.

Q. And Delegate McQuinn also told you she didn't want to pick up those VTDs down in Chesterfield County, didn't she?

A. She did.

Q. Central Gardens, and you can't see it from this map other than to notice the density of African-American population, but it's about 95 percent black voting-age population, isn't it?

A. I do not know that, but I would take your word for it.

Q. It's in the record. You don't have to take my word for it. The Court can verify that, but Masonic is the neighboring VTD here just north of Delegate McQuinn's district, and that's about 73 percent black voting-age population, isn't it?

A. I do not know.

MR. HAMILTON: For the record—I won't take the time to do it, Your Honor—it's Plaintiffs' Exhibit 63, page 52, line 87, and line 949 has the specific numbers in there for the record, but I won't take it through because the document speaks for itself.

Q. These two VTDs, Masonic and Central Gardens, together they contain nearly 5,000 voters of voting-age—people of voting age; correct?

A. I do not know.

[540] Q. And if we look at 701, 702, and 703 on the one hand and compare them to Central Gardens and Masonic on the other hand, you'll agree with me that 701, 702, and 703 are all closer to Delegate McQuinn's home than either Central Gardens or Masonic?

A. I'll agree with that.

Q. So let's move to House District 69. That's also located in the Richmond area; correct?

A. Yes.

Q. And it was underpopulated by about 9,000 voters?

A. I believe so.

Q. And to the west, District 69 borders District 27?

A. Yes.

Q. And District 27 was overpopulated by about 8,000 voters?

A. I don't know by how much, but I know it was overpopulated.

Q. In your deposition, I think you said that sounds about right?

A. I was going to say the same thing.

Q. At least you are consistent. Okay, so, ostensibly, we could have taken House District 69 and moved it to the west and gained population from District 27; right?

A. Yes, you could have.

Q. And all other things being equal, which, of course, is a big statement, that would have taken care of about 95 percent of the population you needed.

A. Yes. Could have done that.

[541] Q. Let's look at that border between House District 69 and 68, if we could. The fifth ward in Richmond is located in the 69th district; correct?

A. Yes, it is.

Q. So, for example, precincts 501, 503, 504, those are all part of the fifth ward?

A. Yes.

Q. That's a heavily African-American area; correct?

A. Yes.

Q. And the areas immediately north of HD 69, House District 69, now we're looking at VTDs 114, 207, 208, those are all in or near The Fan district; correct?

A. Yes.

Q. And they're mostly white?

A. Yes.

Q. And those mostly predominantly white precincts are all located in Delegate Loupassi's district, HD 69; correct?

A. Yes.

Q. And the majority black districts, 501, 504, 503, those are all Delegate McQuinn's district?

A. Yes, I think as they have been for decades.

Q. And—well—

A. Excuse me, Your Honor. Did you say Delegate McQuinn or Delegate Carr? I'm sorry. I want to make sure I heard you properly.

[542] Q. I think I said McQuinn and meant Carr?

A. That kind of threw me off. I wanted to make sure I was answering the question properly.

Q. They were all Delegate—let me ask the question again. The majority black districts, 501, 503, 504 were all in Delegate Carr's district?

A. Yes.

Q. Thank you. Now, you mentioned a minute ago in this case they had been—they were in the benchmark. Of course, you made a lot changes in some of these—in drawing this map, you made a number of changes to the benchmark districts all across the Commonwealth; isn't that true?

A. Yeah, and they were necessitated, I would say, 90-plus percent by population.

Q. Sure. Some districts just went away and then reappeared in another part of the state.

A. Yes.

Q. Because population grew up north and not so much down south?

A. Yes.

Q. And our districts, maybe just looking at HD 69 here, all of this—the yellow area without the hatch marks, that's all new area that's been added in.

A. Yes.

Q. And you made the decisions about which ones of these [542] benchmark lines were going to stay in and which ones were going to change; right?

A. In consultation with members of the Richmond delegation.

Q. Of course, the whole House of Delegates had to vote on it to make it law, but as you were drawing the map—so it's—you had choices here, and you could respect a line that had been there before, or you could change a line; right?

A. Yes, that's one of the only jobs I had.

Q. Let's look at House District 74. This was Delegate Morrissey's district; is that right?

A. Yes.

Q. This one, I think, has been not so kindly referred to as a meat cleaver; have you heard that?

A. I have, but I was not the original architect of that. I want you to know.

Q. All right, appreciate that. All right, now, I won't take the time to recall the exhibit, but do you recall the exhibit that Mr. Braden showed you that showed several iterations of this district, from the 1990s, 2000s, and the 2011 redistricting. Do you remember that one?

A. Yes.

Q. The real change we're talking about here, or one of the significant changes here, is the city of Hopewell.

A. Yes.

Q. And this is—we talked about this a little bit earlier [544] in your cross-examination about the reason for moving that over was to fix the river crossing, or at least that was one of the motivations; correct?

A. Correct.

Q. But that motivation didn't require you to split the city on racial lines; right?

A. No, I maintained what had—what was there before, pretty much the splits that—

Q. You made a decision to respect that line that split the city into a predominantly black half and a predominantly white half and retain that division, just put it in a different district?

A. Yes.

Q. Now, as a result of removing Hopewell, you needed to add population to District 74; correct?

A. Correct.

Q. So one of the things you did was made a decision to add the Randolph VTD?

A. I don't see that on the map.

Q. I think we might have a close-up of this.

JUDGE PAYNE: I think he said he's more comfortable with Defendant's Exhibit 94 and the colors. He knows those better, so maybe you can get that up and ask him about that.

MR. HAMILTON: The problem is, Your Honor, I don't know that it's got the detail. If it does, it's fine. I don't [545] think it does.

Q. Can you look at page 33 of Dr. Rodden's report, Exhibit 69, page 33. There's detail there. It's a close-up of the northwestern arm, page 33. There we go.

So if we look up in the upper right-hand corner, there is an irregular border here that goes around VTD named Randolph. Do you see that?

JUDGE PAYNE: Can you see it? If you can't, there's a paper—

THE WITNESS: I do see it now. It's right here.

Q. That was in the benchmark; correct?

A. Yes, I believe it was.

Q. So this is another example of a border, a district border that you chose to keep, to retain.

A. Correct.

Q. And you can see from the dot density map, if you assume it is accurately prepared, the population inside Randolph is predominantly African American, and the population outside Randolph is primarily white; isn't that true?

A. It appears to be such, yes, sir.

JUDGE PAYNE: Did you decide to keep it for that reason?

THE WITNESS: No, sir. If I may, you asked me about Hopewell. We also took 97—to go back to the other map, I took three or four precincts out of 97 which then undid one [546] more jurisdictional split and came up to the north end, and we tried to have a status quo map from the beginning. So this district has pretty maintained the shape for the last 20 years.

Q. But when you gave up Hopewell, the city was split, I think you said; correct?

A. Correct.

Q. So the part of Hopewell that District 74 gave up was the African-American part of Hopewell; correct?

A. I took them back across—that would be correct, but that was not the reason for it.

Q. But the effect of removing Hopewell from District 74 was to drop the black voting-age population of House District 74; isn't that true? It had—

A. I do not have before me what the racial makeup is on a percentage basis for these precincts in Hopewell to be able to make that, you know, comment, sitting here today, because I want to be sure when I see something what I'm referencing.

Q. Let's look at Plaintiffs' Exhibit 69, page 36. And if you could blow up the portion of that map that shows Hopewell. So the part of Hopewell here, that was the part of Hopewell that was in House District 74 prior to the redistricting; correct?

A. That is correct.

Q. And that's the part that was removed from House District 74.

A. Correct.

[547] Q. And you'll agree with me, at least if this map is an accurate representation, that that's a relatively heavily African-American area of that city.

A. I would agree.

Q. So when we take that population out of House District 74, just simply as a matter of math, it's going to drop the African-American population of House District 74; correct?

A. Correct, but the district had not been completed at that point in time.

Q. Let's go back to where we were which, I think, was page 33 of Dr. Rodden's report.

JUDGE PAYNE: Where are we, Mr. Hamilton?

MR. HAMILTON: Just a moment, Your Honor.

JUDGE PAYNE: Excuse me.

Q. The line in the upper right-hand corner of the exhibit—Exhibit 69, page 33 shows the Atlee VTD just outside of the northern border of District 74; correct?

A. Yes. I think that's number 65; is that right?

Q. Yes.

A. Okay, yes.

Q. That's a predominantly white area; right?

A. Yes.

Q. And that was excluded by the line, and I believe that may have been a preexisting line, but that line was left in place allowing or dividing the—defining the district in such a way [548] that the Atlee precinct in Hanover County stayed with a predominantly white population outside of the district; correct?

A. That's correct. I don't believe the 74th has any part of Hanover County.

JUDGE PAYNE: What does this have to do with Hopewell? Atlee is 50 miles or better from Hopewell. I'm not following the questioning.

MR. HAMILTON: Your Honor, in drawing the districts—

JUDGE PAYNE: And it's not even an adjacent district, is it? 55 isn't adjacent to the Hopewell district, is it?

MR. HAMILTON: It was in the benchmark, and it's—we're talking about House District 74, Your Honor.

JUDGE PAYNE: But not 55 miles away. I'm having trouble understanding why you are relating Atlee to your questions about what happened to the city of Hopewell, because they're probably 50 miles apart. It's a different side of the thing.

MR. HAMILTON: Exactly, Your Honor.

JUDGE PAYNE: Go ahead with that then.

MR. HAMILTON: May I explain, or would you like—

JUDGE PAYNE: You can explain later. Go ahead and ask the question and clarify if you need to.

Q. Atlee is a largely white VTD; correct?

[549] A. Yes, in a different county.

Q. And it was excluded from House District 74 by the line?

A. That's correct.

Q. There were two split VTDs in House District 74, and I understand you didn't split them. So I won't—correct?

A. That's correct.

Q. So I won't ask you why they were split. I assume you don't know; is that right?

A. I couldn't tell you.

Q. Let's move to House District 77. That's in the Tidewater region; is that right?

A. Yes.

Q. Represented by Delegate Lionel Spruill?

A. At the time, yes, sir.

Q. Who we just saw a moment ago. That district started out at 57.6 black voting-age population; is that right?

A. That sounds about right.

Q. And Delegate Spruill actually asked for a 55 percent black voting-age population in his district; correct?

A. Yes, and he felt that was important for all of the districts, yes. That's what he represented to me.

Q. And you drew his district in order to comply with that 55 percent racial target; correct?

A. I drew his district to honor his request in moving the precincts around, and the result of that was to comply, yes, [550] sir.

Q. But you knew that as a result of moving the precincts around, it would affect the racial composition of the district. That's the whole point of it; correct?

A. The whole point of it really was to move population. He had a need for population. I had excess population, and Hampton Roads itself had a need for population. So it was a request of the member for various precincts that he lived next to.

Q. But you understood that the reason he was making the request was to comply with the 55 percent BVAP. He wanted to have an end goal of 55 percent black voting-age population in his district; isn't that true?

A. Yes, but I believe your question was the reason he asked for this. He had certain requests to move precincts in because they were next to where he lived.

He wanted to get rid of a precinct because there was a potential opponent in that precinct.

Q. Sure.

A. I want to be clear my response is accurate to what your question was.

Q. You understood having a 55 percent black voting-age population was important to Delegate Spruill?

A. Yes.

Q. And you complied with his request to adjust the boundaries [551] to ensure it had a 55 percent black voting-age population.

A. Yes.

Q. Thank you. So one of the things that happened here—you mentioned a moment ago the airport VTD. That's on the far west side of House District 77; correct?

A. Correct.

Q. That moved over to your district; is that right?

A. Yes.

Q. I think you said it was a good Republican district?

A. Yes.

Q. That's a largely white, predominantly white district; correct? VTD, sorry.

A. Yes, it's rural.

Q. Rural?

A. Yeah, rural.

Q. It's late, and that's a tough one. And there were a couple of split VTDs in this area. Again, you weren't responsible for splitting them, we'd have to ask Mr. Morgan about that; is that right?

A. Yes.

Q. Let's move to House District 80, if we could. The incumbent here is Matthew James?

A. Yes.

Q. This was underpopulated by about 9,000 people and below the 55 percent black voting-age population target; correct?

[552] A. That sounds about right, yes.

Q. Prior to the redistricting, House District 80 was not in Suffolk, was it?

A. No.

Q. In the final plan, this district crossed four city boundaries; right?

A. Correct.

Q. Chesapeake, Norfolk, Suffolk, and Portsmouth?

A. Yes.

Q. And it featured two water crossings.

A. Yes.

Q. And on the far side, the far eastern side of the district, the Chrysler Museum VTD was across the river from the rest of the district; right?

A. Yes.

Q. So the new material that was added here, or territory that was added here, or these VTDs in the

sort of the western arm, that's VTDs 38, Taylor Road, Yeates, 34, 33, all these out here; correct?

A. Yes. That would be the western part that was added to the district.

Q. And VTDs—the far part of this, VTDs 38, Taylor Road, and Yeates, those are all Suffolk, aren't they?

A. They are.

Q. It's a different jurisdiction?

[553] A. Correct.

Q. Let's go back to the previous map. 38, Taylor Road, Yeates, those are all VTDs with significant African-American population; correct?

A. Yes.

Q. And the thing that I—at least to me is striking, when looking at this, is House District 80 did not pick up these districts right here in the middle which, I think, are Silverwood, Churchland, Fellowship, or Nansemond.

A. That's correct. That's the county I was raised in.

Q. Did I pronounce it correctly?

A. You did very well.

Q. And, in fact, the district seems to, like, go up right around them, almost like a donut to avoid them; right?

A. That was a current configuration. The western part of 80 was in House District 79 prior—that was in the benchmark plan of 79, and Delegate Joannou did not want to have four jurisdictions. So Matthew James

picked up the configuration that already existed. So 79 and 80 flipped and switched and got those precincts here, here, and like this.

Q. That sort of northern arc over the top of the district here?

A. Right.

Q. The areas that were avoided here, the ones we just mentioned, Silverwood, Churchland, Fellowship, and your home [554] town, Nansemond, those are all largely white; correct?

A. It's very Republican, and they're in my district, and I was a patron of the bill.

Q. And they're also largely white?

A. They are. But they are very good performing Republican precincts.

Q. Fair enough.

A. I think I get 70-some percent in all of them.

Q. If we step back and look at the racial composition, it's striking here, isn't it, the areas that were included are largely white, the areas that were—I'm sorry, the areas that were included in District 80 are largely predominantly African American, and the areas that were excluded are predominantly white; isn't that true?

A. They was not excluded. All I did was take the current configuration of 79th on the western edge and use that for the 80th.

Q. Let's look at House District 89. This is Delegate Alexander's district; correct?

A. Yes.

Q. And so let's start with the—zoom in. Ms. Marino, I think, has a close-up of the northern part of this map. I want to talk to you a little bit about this Suburban Park VTD. The Suburban Park, I think we have a different one that actually shows the location of the funeral home.

[555] So this is page 58 of the Rodden report, figure 20 for the record. If we look—this is a close-up, you see Suburban Park to the right on the top half of the map?

A. I do.

Q. That was in the benchmark; correct?

A. It was.

Q. And then to the left is Granby precinct?

A. That's correct.

Q. Delegate Alexander owns a chain of funeral homes; is that right?

A. He does.

Q. And his funeral home was in the benchmark District 89.

A. That one was, correct.

Q. And the map actually drew it out of the district by dropping Suburban Park.

A. That is correct.

Q. And Suburban Park is a largely white or predominantly white VTD; correct?

A. That is correct.

Q. Now, you—I believe you testified that you're mistaken, and, of course, we all make mistakes sometimes, but I thought that you testified that the

reason that the Granby VTD was split was because of this funeral home.

A. I did. I think I corrected that today and said I was mistaken.

[556] Q. So I believe—

MR. HAMILTON: And Ms. Marino, perhaps you can pull up the trial transcript on page 345, line six through nine.

Q. I think the question was, by Mr. Braden, "So am I correct to understand that you split these VTDs pursuant to his request to put a funeral home in his district," and your answer was, "That is my recollection, yes, sir." That was your testimony at the trial the first time.

A. That's correct, and that was my recollection, and, obviously, I was incorrect.

Q. Okay. So let's go back to the map. So what you thought was that the funeral home was somewhere in this area where the little pipe figure is, and that's the reason that we had to split the VTD, and I know you were wrong, but I'm just asking, that's the mistake we are talking about?

A. You have to show me where Granby Street is and I can show you where I thought it was but over where Granby would be.

Q. I assume it's somewhere in the area where you put the X; that is, in the northern half of this split of the Granby precinct since if you were trying—

THE COURT: He said he can't identify it unless you show him the street, so show him the street. I

think this is a dead horse, too. But if it's important to you, show him the street.

A. I'll answer yes.

[557] JUDGE PAYNE: Otherwise, leave it be and go on to something else, if you would.

Q. Delegate Alexander had three funeral homes, I think you testified; correct?

A. Yes.

Q. One of them was here in the Suburban Park VTD.

A. Correct.

Q. One of them was in the Berkley VTD?

A. Correct.

Q. And one of them was in Southampton; is that right?

A. It's in Portsmouth somewhere. I could not tell you which precinct it is.

Q. But so we didn't need—this is simply a mistake you made at the time that you were drawing the map, or was this a mistake you made at the time you testified before this Court in 2015?

A. I would say to the Court and to the gentlemen that I believe previously I've testified during this process, a very tightly compressed process I would add, I met with many, many delegates along the way. There was a request for a funeral home to be added. So I was mistaken in the northern part which was on Suburban.

I knew that we had added a funeral, which we did, which is factually correct, in Berkley. So it was a

mistake on my part. I guess I was drinking too many Mountain Dews, meeting with too [558] many different members, and I don't mean that to be flippant. But that's how quickly—it's like a vortex when you're trying to get that many things satisfied to get a bill in a position to be considered by the body. So it was an honest mistake, and I've acknowledged that.

Q. Fair. Thank you, sir. I don't mean to challenge you on the mistake other than try to understand how the VTD was split. You didn't actually split this VTD here in Granby; that was another one of Mr. Morgan's fine carpentry work; correct?

A. That would be correct.

Q. Now, one of the other changes—

MR. HAMILTON: And, Ms. Marino, if we could go back to the House District 89 larger map. I think this is page 56 on Plaintiffs' Exhibit 69. Page 56, Exhibit 69.

Q. One of the other significant changes here in this is the addition of the Berkley precinct to House District 89; is that right?

A. Yes.

Q. And now the Court, after the first trial, observed that the Berkley VTD is relatively close to Delegate Alexander's residence. Do you recall reading that?

A. No, but I think by the maps I've seen, I believe it is.

Q. Delegate Alexander's home is actually on the opposite side of the Elizabeth River from Berkley VTD, isn't it? In the Ghent Square VTD?

[559] A. Yeah. It's in Norfolk, but it is across the river, that is correct.

Q. In any event, that's not the reason that you added the Berkley VTD to the—to House District 94?

A. I believe it was a request from him to add the funeral home, but if—I'm going from memory here. I think Berkley used to be in the 80th.

Q. So just to be clear, I need to correct what I just said because I think I misstated the number of the house district. It was not—adding Berkley to House District 89 was not because of the location of Delegate Alexander's home?

A. No.

Q. It was, instead, because of one of his funeral homes was located there?

A. Correct.

Q. That's the Metropolitan Funeral Service?

A. Yes, sir, correct.

Q. Let's turn to House District 90, if we could. House District 90 was represented by Delegate Algie Howell during the 2011 redistricting; correct?

A. Yes.

Q. And it had a black voting-age population of just shy of 57 percent; is that true?

A. I believe that's correct, yes.

Q. And it bordered District 89 which was a little low, it had [560] about 52.5 percent black voting-age population?

A. I take you at your word. That sounds right. I believe they both needed population, period.

Q. So one of the changes you notice right away here is that Union Chapel was moved from District 90 to District 89.

A. Your Honor, if I may, this map does not work for me. If you'll give me a map I can keep here and look to have a cross-reference. It's just very difficult for me to follow.

Q. We'll get you one right away. Is this better?

A. Yes, absolutely.

Q. Would you like a paper copy?

A. If you have one, that might help us. I don't want to intrude on the Court's time unnecessarily.

JUDGE PAYNE: He's about through anyway.

THE WITNESS: That's good.

JUDGE PAYNE: You can take the paper copy. I want you to have what you need. What is it, 94?

THE WITNESS: I have one right here. Page 11. All right, this is what I'm used to.

Q. So on the far west, we can see Union Chapel.

A. Yes.

Q. That was moved from District 90 to District 89; correct?

A. That's correct.

Q. 90 had high black voting-age population, 89 had lower black voting-age population; correct?

[561] A. I think so, but I don't know for certain. I know they both had—they needed population to get back to the ideal size of 80,800.

JUDGE PAYNE: Mr. Hamilton, he's established beyond any question that he doesn't have present

recall of what exactly those figures were, so take them out of your questions, if you will. He said time after time he didn't have exact recollection. He will take you at your word. You'll have to prove that in your briefs, but it's not in the question anymore.

MR. HAMILTON: I don't think it's a matter that's in dispute—

JUDGE PAYNE: May not be, but it's just not the right way to ask a question.

MR. HAMILTON: Thank you. I'll correct my form of the question. Thank you for the point.

Q. Union Chapel, this VTD that we're looking at, has a high minority population, does it not?

A. Yes.

Q. Okay?

A. As do many around there, I believe.

Q. Let's move to House District 92, Delegate Ward's district?

A. Yes, sir.

JUDGE PAYNE: Is that page 13?

MR. HAMILTON: I'm sorry, Your Honor?

[562] JUDGE PAYNE: I said is that page 13 to that exhibit?

MR. HAMILTON: I believe so, Your Honor.

Q. District 92, I think you said, talking about this whole area, and correct me if I'm wrong, it would not be possible to—it would be possible to draw—Mr. Braden drew a line something like this—it would be possible to draw two 55 percent black voting-age

population districts without that whole northern extension arm.

A. I said I thought you could, but I did not do that exercise.

Q. You didn't do it, but you thought you could?

A. But I didn't say you could. I said I thought you could.

Q. Okay. And it's certainly not what you did?

A. No.

Q. What we did, we know, is create this whole extension up that added the armed House District 95; correct.

A. I think your question is in reference to House District 92. What I did with House District 92 is draw what the incumbent member wanted. That had an impact on House District 95, because the questions are relating to one district out of a hundred and don't operate in a vacuum.

Q. Of course. House District 92 added precincts Kraft, Forrest, and Mallory to House District 92; correct?

A. Correct.

Q. Those are all predominantly African-American populations; [563] right?

A. I think so, yes.

Q. And in the eastern part right here, there's a VTD called Phoebus?

A. Correct.

Q. That's mostly white?

A. Yes.

Q. That was taken out?

A. Yes. That appears to be taken out. It was put with Bryan, I believe, because they have a community of interest.

Q. Then there was a little extension here at the northern—northeastern part of this district. It was also modified. That little strip was brought back; correct?

A. That appeared to be the case.

Q. That's a predominantly white area just to the east of that?

A. Right, represented by Delegate Helsel of Poquoson. That was existing.

Q. Let's look at District 95. This whole new arm—we've talking about this for a far bit of time now. This whole northern extension was added to House District 95; correct?

A. Correct.

Q. House District 95 went from an oblong shape to sort of an elongated shape with the addition of VTD Sandy Bottoms, Saunders, Palmer, and so up the arm?

[564] A. Yes.

Q. Maybe we can look at the Rodden report, Exhibit 69, page 47, figure 16. This is a close-up of the very tip of House District 95, and it's four VTDs in a row, Jenkins, Denbigh, Epes, and Reservoir. Do you see that?

A. I do.

Q. And you didn't draw this line.

A. No.

Q. And it's—but it's split all four of these VTDs in a row, so we have to ask Mr. Morgan about that.

A. Yes.

Q. To the best of your understanding, these were split for the purposes of population balance?

A. Correct.

Q. And as we evaluate the reasons for splitting these VTDs, we can be clear about one thing. There is no political performance data available below the VTD level, to your knowledge; correct?

A. I'm not aware of, but from this perspective, I would say it was split for population and for political reasons.

Q. But there's no political performance data below the level of the VTD. You can't know where the Democrats are and where the Republicans are from the census data; it's not reported.

A. Other than talking to members, you certainly can. They know their districts. Delegate Oder was very informative in [565] what would work.

Q. Did Delegate Oder draw this line?

A. He did not draw the line, but he was very clear as to what was Republican territory.

Q. Delegate Jones, in the last trial, you testified that you did a functional analysis with respect to District 75. Do you remember that testimony?

A. I think that was my term of art. I'm not sure it really exists anywhere in the dictionary, but, yes.

Q. You met with Delegate Tyler on a couple occasions to discuss District 75?

A. More than a couple, yes, sir.

Q. And you looked at several elections in House District 75?

A. I did.

Q. There had been a number of close races there?

A. Yes. I believe she ran in 2007 or 2005 in a primary with—four- or five-wide primary with two Caucasians, and she barely won the primary, and then she barely won in the general election that year, if I remember correctly, November.

Q. And you examined turnout rates throughout District 75?

A. I can't say I did turnout rates, per se, but, you know, talking with her, with the member, she had a real concern about turnout and impact.

Q. And you considered the district's prison population and the impact that might have on her ability to get reelected; [566] correct?

A. Yes. I was informed by her that that was a real concern.

Q. And after the first trial, this Court concluded, and I think it's undisputed, that 55 percent BVAP number came from these concerns and discussions you had with Delegate Tyler and then was applied across the board to the 11 other districts. That's a fair statement; correct?

A. That's what the Court said, is what you are saying?

Q. Well, it's a fair statement that that 55 percent number was applied across the bored to the 11 other districts; correct?

A. Yes, but you have a two-part question, I think, so I'm trying to make sure I'm answering it as I understand it.

Q. As you were drawing these other districts, and by that I mean the districts other than 75, the challenged districts, you didn't put them side by side with District 75 and compare the extent to which they were the same or different than House District 75?

A. No.

Q. And you didn't look at the differences or similarities in racial composition between House District 75 and any of the other districts?

A. No.

Q. You didn't look at the difference or similarities between—in voter turnout between House District 75 and any [566] of the other districts?

A. No. I was just informed by the members, the individual members of their districts.

MR. HAMILTON: If we can pull up the 2017 deposition transcript at page 251, and the answer spills to 252.

Q. Do you remember I took your deposition on August 23rd of this year?

A. I do.

THE COURT: Can you enhance the size of it? What question and line for the opposition?

MR. HAMILTON: We're looking at page 251, line 16, to page 252, line one.

Q. So I asked, "And with respect to all of the remaining districts, you didn't go through and compare the extent to which they were the same or

different than House District 75. "Answer: No, I did not. "Question: And that includes you didn't look at the differences or similarities in racial composition, voter turnout, election history, or prison populations," and your answer was, "That would be correct." Do you recall testifying in that manner during your deposition?

A. I do.

Q. And you didn't look at differences or similarities in election history between District 75 and any of the other districts?

[568] A. No. I was very aware, though, of the history of—I think I was asked a question at the last trial by—I can't remember who it was, the last time an incumbent was challenged and they didn't elect the candidate of choice. I certainly was aware of election results and—

Q. Let me—

JUDGE PAYNE: Let him finish his answer.

Q. Were you finished with your answer?

A. That's how I would have been informed by those members and by that information.

Q. Direct your attention—

MR. HAMILTON: Can you pull up page 220 of 2017.

Q. Page 220, lines eight through 14. And the question was, "But my question is, you didn't put these two districts together, 77 and 75, and, and compare the, the history of elections and who was voting for whom as between the two districts? "Answer: No. Like I said earlier, I'll answer for all the rest of them. I

didn't compare any to 75 in that context." Did I read that correctly?

A. You did, because your question to me was a comparison between the two. That does not mean I did not do an evaluation—

JUDGE PAYNE: Just a minute, Delegate Jones. Yes, Mr. Braden.

[569] MR. BRADEN: I am mystified as to the inconsistency that this impeachment—

JUDGE PAYNE: Neither one of them has been inconsistent. I think it's because we're tired and at the end of the day, but they're cross-purposes answering different questions, and it wasn't inconsistent. So let's go on, Mr. Hamilton. Do you have anything else you need to ask this witness?

MR. HAMILTON: I do, Your Honor.

JUDGE PAYNE: How long? I think—

MR. HAMILTON: Probably about five minutes.

THE COURT: You've already had about double the time of direct. I think we're going to have to put a restriction on cross-examination if we have to do this in the future. All right, let's go.

Q. Delegate Jones, you didn't look at the actual registration rates of African Americans or—the African-American population in any of these districts and compare those registration rates to the white voters in the challenged districts; correct?

A. I don't know whether that information is available to us.

Q. So the answer is you did not?

A. No, because I don't think it's available to us.

Q. You didn't look at differences or similarities in prison populations between District 75 and any of the other districts?

[570] A. No.

Q. You didn't compare any of these other districts to House District 75 in terms of retiree populations, university populations, military installations, or personnel?

A. I did not compare, but I certainly was aware. We have VCU in downtown Richmond. As I attended MCV campus, I would not need to compare that to House District 75.

Q. You didn't do any kind of racially polarized voting analysis for any of these other districts, did you?

A. I'm not aware of it ever being done in preparing a map.

Q. You didn't do any kind of analysis to determine whether the districts would be considered retrogressive under Section 5, did you?

A. I talked to the members that represented the districts.

Q. You mentioned, Doctor, the Dr. Loewen report a moment ago. Do you recall that?

A. I do.

Q. You didn't review the Dr. Loewen report during the 2001 redistricting process, did you?

A. I don't think it existed in 2001.

Q. I'm sorry, 2011?

A. I'm still keeping up this late. I was aware of it, and I was aware that it supported a 55 percent.

JUDGE PAYNE: I think the question was, did you review it during the process of redistricting in 2011.

[571] THE WITNESS: Yes.

Q. You did review it?

A. I reviewed only the fact—I didn't read the entire report, but I was aware it existed. So I guess we've got a difference of—review to me might mean something different to you.

Q. Did you read it?

A. I did not read it's entirety—

Q. Did you have a copy of it?

JUDGE PAYNE: Excuse me, Mr. Hamilton. You stepped on him again. Did you read it at all is the first—

MR. HAMILTON: Let me rephrase the question maybe, Your Honor.

Q. You didn't read the Loewen report during the 2011 redistricting process; isn't that true, sir?

A. I was informed by my counsel—

Q. That's not my question.

JUDGE PAYNE: Mr. Hamilton. Do you want my job? Give me a minute.

MR. HAMILTON: I don't think I could be confirmed, Your Honor.

JUDGE PAYNE: I don't think I could be either. Listen to the question he's asking you, and just answer that question. If your lawyer wants to ask you

something else later, he can do it. Can you go again, Mr. Hamilton.

[572] MR. HAMILTON: Yes, thank you, Your Honor.

Q. You did not read the Loewen report during the 2011 redistricting process, did you, sir?

A. No.

Q. In fact, you didn't have a copy of it.

A. I did not, no.

Q. And it's fair to say that you didn't make any redistricting decisions in 2011 based on that report because you hadn't even read it?

A. That is not true. I was informed by my counsel.

MR. HAMILTON: Your Honor, I guess I would move to strike the answer. We've been precluded by an assertion of the attorney-client privilege to hear what he was informed by his counsel. We've inquired. Mr. Braden has instructed him not to answer.

So I would move to strike the answer because we are another not allowed—he's either going to waive the privilege and we're going to get into this right now or I move to strike because we haven't been allowed discovery into exactly what those conversations were about.

MR. BRADEN: Your Honor, he asked the question. He's entitled to answer it.

JUDGE PAYNE: You opened the door and asked for it, I think. I think you're stuck with what happened.

MR. HAMILTON: Actually, the question was—

[573] JUDGE PAYNE: I understand. I think let's go on.

Q. You didn't make any redistricting decisions in 2011 based on the report because you didn't even read it. You didn't read it, did you? Let's start it there.

A. Did not read it.

Q. So whatever you may have known about the Loewen report, it would have only been—you would have only learned that from communications from your lawyers; is that right?

A. That would be correct.

Q. And your lawyers never gave you a copy of the report. We've established that; right?

A. Correct.

MR. HAMILTON: Thank you. No further questions, Your Honor.

JUDGE PAYNE: You all did resolve this issue about waiver at the initial pretrial conference, and there's an order that addresses it. I don't really, frankly, remember what it says. I have to plead guilty on that. I want you to file in the morning, by seven o'clock, briefs simultaneously on whether or not he has to answer the question. I guess your question is, what did your lawyer tell you.

MR. HAMILTON: Well, Your Honor—

JUDGE PAYNE: Or what do you want?

MR. HAMILTON: I didn't ask that question here. I did ask it in a deposition before trial so that I would know [574] whether I wanted to ask it here or not. I wasn't allowed to hear the answer to the question at the time. I think if he's testified this way, I think he's

waived the privilege, and rather than filing briefs, I'd like to take his deposition.

JUDGE PAYNE: To do what?

MR. HAMILTON: Take his deposition, find out what his lawyer said.

THE COURT: That presumes that he's waived it. The issue we're asking you to brief is whether there's been a waiver.

JUDGE KEENAN: It seems to me at this point you have a content-void answer. I talked to my lawyer. That doesn't mean anything, that he talked to his lawyer. So if you want to pursue the substance, then I think we do need to have some briefing on it, because that's contrary to what we understood at the pretrial conference.

JUDGE PAYNE: At the pretrial conference, we had gotten to the point ultimately that there was really no substance on the advice, but I think it had to do with Marston, not with him.

MS. McKNIGHT: That's correct.

THE COURT: And it was a somewhat slightly different issue, but it's presented in the same context here, and the same basic question is presented, and that is, does the fact that he said I got it from my lawyer, does that waive the [575] substance of the advice that he got from the lawyer, and that's what you all were briefing in Marston, and I think you didn't have the best side of that issue on that point, but if you want to issue it now—brief it and hand us in some papers in the morning at 7:00, we'll get here by 8:30 or so and read them and be prepared to hear

you at 9:00 on whether there's been a waiver. That's where I think we are. Do you agree, Judge Keenan?

JUDGE KEENAN: Yes.

JUDGE PAYNE: Do you agree, Judge Allen?

JUDGE ALLEN: I do.

MR. HAMILTON: If I might, I'd like to discuss it with my team, and if we decide we want to pursue this we'll file a brief if that's acceptable to the Court.

JUDGE PAYNE: It's always good to pray over things.

MS. McKNIGHT: Your Honor, the only issue there is that you requested simultaneous briefs, so we would need to know if they plan—

JUDGE PAYNE: I was coming to that. When are you going to let everybody know what you're going to do, because they have an obligation, too.

MR. HAMILTON: I'll let them know within an hour, Your Honor.

JUDGE PAYNE: Does that suit you?

MS. McKNIGHT: Yes, Your Honor.

[576] JUDGE PAYNE: All right, and then you have redirect in the morning; is that right?

MR. BRADEN: Your Honor, I think we'll waive redirect.

JUDGE PAYNE: So that's the end of it then. Is there anything else we need to do tonight before we adjourn?

MR. BRADEN: Excuse me, Your Honor. Delegate Jones has personal issues and does need to be released. We believe we're finished with him. We

would not endeavor to do redirect with him tomorrow morning unless this issue commands that he be here.

JUDGE PAYNE: Well, if he's waived the privilege, he has to be here, but I don't know what the personal issue is and what the time schedule involved in connection with it is. Maybe you'd like to talk with him about it, and it may not be that—since it's not a bench trial, it may be if he's tied up in the morning and he needs to be here, then he can be here in the afternoon or we can do something else. We have a lot of flexibility since it's not a jury trial.

MR. BRADEN: Your Honor, can I have a moment to assess the matter with our witness?

JUDGE PAYNE: Yes. Go over there and talk to him.

MR. BRADEN: We're prepared for him to come back tomorrow morning.

JUDGE PAYNE: Okay, if need be. You are going to do [577] redirect then?

MR. BRADEN: Yes.

THE COURT: And you're going to let them know within an hour.

MR. HAMILTON: I'll let them know right now. I don't think we need to brief the issue. I think where it stands, it's, as Judge Keenan pointed out, a content-less answer. If he goes further than yes—but I would ask for the opportunity to depose him outside of court hours so we can find out what he's going to say, because, frankly, you know, this is a bit of an ambush, Your Honor, where there's an assertion of a privilege during discovery that prevents us from—and then a

change of heart and an answer that operates to waive the privilege.

JUDGE PAYNE: He never got any further than the question and the answer about, yes, I consulted the lawyer at the trial—I mean at the deposition. Also, in the case of Marston, was that also the situation here in connection with his deposition?

MR. HAMILTON: No.

JUDGE PAYNE: So you just were precluded from talking about it, period, here?

MR. HAMILTON: Correct.

JUDGE PAYNE: The record there will be—why don't we leave it—you don't want it, and if he goes further than [578] that, you want some rights, and we'll deal with it at that time.

MR. HAMILTON: I'll probably be on my feet objecting.

JUDGE PAYNE: And as Judge Williams says, let us abide the event.

MR. BRADEN: If that's where we are, then we would prefer to release Delegate Jones and let him go home if that's possible. We have no longer any need to call him and we would not redirect.

JUDGE PAYNE: All right.

MR. HAMILTON: We have no objection to him being released.

JUDGE PAYNE: You are released from your obligation to be here—wait a minute. Do we have any questions? I didn't think about us. Do you? Okay, thank you for being with us. We'll be in adjournment, and see you at 9:00 a.m.

(End of proceedings.)

Transcript of the Bench Trial, *Bethune-Hill v. Va. State Board of Elections* (Oct. 12, 2017)

[581] THE CLERK: Day three. Case No. 314-cv-852.

Golden Bethune-Hill, et al. v. The Virginia State Board of Elections, et al. and the Virginia House of Delegates, et al.

The plaintiffs are represented by Kevin Hamilton, Abha Khanna and Aria Branch. The Virginia State Board of Elections is represented by Matthew McGuire. The Virginia House of Delegates is represented by Amy Tolbert, Mark Braden, Katherine McKnight and Richard Raile.

Are counsel ready to proceed?

MR. HAMILTON: We are, Your Honor.

MS. MCKNIGHT: Yes, Your Honor.

JUDGE PAYNE: Good morning. Please remember that the objective is to wrap this case up by the end of the day today. And I just take it, from reading the expert reports, that your experts are not going to be as detailed as the others, or as long. But I'm not trying to cut you off, but I do think we need to move along. There was a fair amount of repetition in the examination of experts and in the cross-examination of experts yesterday and the day before.

MS. MCKNIGHT: Thank you, it's well taken. And I am up here to address two administrative points, [582] including one, the schedule.

The second issue are exhibits. If you don't mind, if I quickly go through exhibits for the record, and then I'll address the schedule for today, what we anticipate happening.

JUDGE PAYNE: Sure.

MS. MCKNIGHT: Okay. Thank you. Defendant-intervenors in this case filed an exhibit list at Docket No. 187. I'm going to identify the exhibits in Docket No. 187-1 that do not have any objection to them by plaintiffs or we've come to an agreement with plaintiffs that an exhibit, as edited, can be submitted to the Court. DI-1 --

JUDGE PAYNE: How many are there?

MS. MCKNIGHT: There -- I'm trying to do a rough count.

JUDGE PAYNE: I guess -- here's what I'm getting at. Can you just take a piece of paper and print it out and checkmark the ones that you all are in agreement on, and then you don't have to read them into the record?

MS. MCKNIGHT: Yes, Your Honor. We'd be happy to do that. We can have that prepared today and submit it later today.

JUDGE PAYNE: Sure. Just make sure both sides are signed on on that matter. Sure.

[583] MS. MCKNIGHT: Okay. Thank you. On the point of schedule, and I'll keep this brief, yesterday plaintiffs rested their case at close to 3:00 p.m. And that is with defendant-intervenors shaving two hours off of their anticipated cross-exam time. And by our calculations, plaintiffs were able to reduce their time by a little under an hour. So we are trying. We are working toward the goal. Today, defendant-intervenors expect and will work toward putting on six of their remaining eight witnesses. Now, it will be a hustle to get through them, but we have worked to

hone our examinations and we will also work to limit cross-examination time to at least equal to what the direct is and hopefully less than what the direct is. Now, we understand that the Court may have time tomorrow. We have two witnesses that we don't expect to need more than an hour with, Your Honors, tomorrow morning.

JUDGE PAYNE: For you.

MS. MCKNIGHT: Correct. And by looking at estimate from --

JUDGE PAYNE: Who are they?

MS. MCKNIGHT: One is Dr. Hofeller. He's an expert, and the other is Delegate Stolle.

JUDGE PAYNE: Delegate who?

[584] MS. MCKNIGHT: Delegate Stolle, S-T-O-L-L-E.

JUDGE PAYNE: Yeah.

MS. MCKNIGHT: He's in the Norfolk area, Your Honor.

Now, by our estimates on Docket No. 209 when the parties submitted their estimates of time, plaintiffs have estimated they need the same amount of time as plaintiffs with these witnesses. Now, both of those times may reduce, meaning we may not need a full hour and plaintiffs may not need a full hour either. Now, granted, Your Honors have also asked for closing arguments of 15 minutes per side, and, of course, there is a rebuttal case.

JUDGE PAYNE: We can pass that.

MS. MCKNIGHT: Pardon?

JUDGE PAYNE: We don't need the closing arguments.

MS. MCKNIGHT: Okay. So I wanted to give you an alert that we need about -- defendant-intervenors need about an hour of your time tomorrow, and we would anticipate that plaintiffs would need no more than an hour either. But they are welcome to --

JUDGE PAYNE: Do you have anything to say, Mr. Hamilton?

MR. HAMILTON: Yes, Your Honor. I always have something to say.

[585] JUDGE PAYNE: That was a silly question, wasn't it?

MR. HAMILTON: Dr. Hofeller, the parties anticipate -- I think the intervenors anticipated three-quarters of an hour on direct, and we anticipated three-quarters of an hour on cross. I can't imagine that it would take three-quarters of an hours to present him or to cross him, and I expect that altogether the time for Dr. Hofeller is probably under an hour. He -- the report -- the supplemental report -- other than his -- you know, he submitted an original report. He's already testified in this matter, and the original testimony is part of the record. The supplemental --

JUDGE PAYNE: What about your rebuttal case I think is what I would like to know?

MR. HAMILTON: At most, an hour.

JUDGE PAYNE: Okay. Well, you may not have an hour. I don't know. Let's see. I'm picking a jury at 1:00 tomorrow, and your case must be over. It's a criminal case and it has to be tried for speedy trial reasons -- or I guess, no, it doesn't. It has to be tried

because I don't have any other time, I guess, is the correct statement. But this case, I expect, will be over in the morning. Okay? And you all need to work that way and plan your rebuttal that way and -- [586] because I don't think we'll -- I don't think it's fair to have the rebuttal case be put off three weeks or a month because that will end up not helping anybody. So let's see what we can do by moving forward with an understanding that we will be closed no later than noon tomorrow and probably before that.

MS. MCKNIGHT: Thank you, Your Honors.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: Okay. Who's your witness?

MR. RAILE: Your Honor, the defendant-intervenors would like to call John Morgan.

JUDGE PAYNE: All right.

JOHN B. MORGAN,

called at the instance of the defendant-intervenors, having been first duly sworn, testified as follows:

JUDGE PAYNE: Please.

MR. RAILE: Good morning, Your Honors.

DIRECT EXAMINATION

BY MR. RAILE:

Q. Good morning, Mr. Morgan.

A. Good morning.

Q. Would you state your full name for the record and spell your last name?

A. John Bennett Morgan, M-O-R-G-A-N.

[587] Q. What is your occupation, Mr. Morgan?

A. I'm a demographer.

Q. Can you explain to the Court what that is?

A. Yes. I work with census data, political data. I work on elections, redistricting, campaigns. I do analysis and such for campaigns and redistricting.

Q. When did you get your start in the area of redistricting?

A. In 1991 while I was in college.

Q. Where were you in college?

A. At the University of Chicago.

Q. And what was that redistricting experience during college?

A. I worked with the Indiana General Assembly members to craft some plans that were used during that process in Indiana.

Q. And how did that experience come about?

A. My father was a political consultant, and while I was in college, he was engaged with Indiana. And so I was able to go down to Indianapolis from Chicago and spend some time redistricting with him.

Q. And did you graduate from the University of Chicago?

A. Yes, I did.

Q. And what was your degree in?

A. History.

[588] Q. Were you admitted into graduate school?

A. I applied to GW, George Washington, for graduate school, and I was accepted, but I declined to go in the fall of 1991.

Q. And why did you do that?

A. Because I was deeply involved in redistricting, and that's the direction my career took.

Q. How many years' experience do you have in redistricting?

A. Twenty-five years.

Q. And how many redistricting cycles is that?

A. I worked in three circles: 1991, 2001 and 2011 cycles.

Q. And do you have -- how many states, approximately, do you have redistricting experience in?

A. I've had redistricting experience in 20 states.

Q. And can you just give a few examples?

A. Sure. I've worked in Rhode Island, New York, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, Florida, Illinois, Ohio, Michigan, Wisconsin, Iowa, Indiana, New Mexico.

Q. Sure. Thank you. Have you ever drawn a map that was used for actual elections?

A. Yes.

Q. One or more than one?

[589] A. Several.

Q. Okay. And do you have redistricting related experience other than in drawing maps for a proposal to legislative bodies?

A. Yes. I've worked with local jurisdictions, with counties such as Atlantic County, New Jersey. I've worked in Wake County, North Carolina, with the Wake County School Board districts. I've drawn

county council -- county commission districts in Indiana, Muncie, Indiana. Places like that.

Q. Do you have redistricting experience in Virginia?

A. Yes.

Q. Where did you live?

A. I live in Northern Virginia.

Q. And how long have you lived there?

A. Since I was 8 years old. Since 1978.

Q. Have you traveled in Virginia?

A. Yes. I've traveled all over Virginia. I've been to every county and independent city in Virginia.

Q. Do you have political experience in Virginia?

A. Yes. I've worked on campaigns every odd yeared cycle pretty much since 1995, '97 forward.

Q. And you mentioned redistricting experience in Virginia. Can you describe that briefly?

A. Sure. In 2001, I was hired by the leadership of the [590] House of Delegates, including the Speaker of the House, to help draw plans for the Virginia House of Delegates.

Q. And what was your role in that redistricting?

A. At that time, I worked with the majority leader, who's now in Congress, and I worked with Delegate Jones and the Speaker of the House to draw plans for consideration in the Virginia house.

Q. Is that the first time that you met Delegate Jones?

A. No. I met Delegate Jones when he first ran for office in 1997 in Suffolk.

Q. And what -- how did you meet him in that -- what was the context of your meeting him?

A. Oh, in 1997, he was a first-time candidate, and part of my election work at that time, I was helping first-time candidates.

Q. So did you work on his campaign?

A. Yes, I worked on his campaign.

Q. And what House District was that for?

A. District 76.

Q. Okay. What was Delegate Jones' role in the 2001 redistricting?

A. At the beginning of the process, he was one of the regional leaders. So he was responsible for drawing the Tidewater area, South Hampton Roads, the peninsula. And as the process went on, his role expanded. The Speaker [591] had him work in other areas of the Commonwealth with other delegates, and ultimately, he was chosen to carry the bill in 2001 that became what we now call the benchmark plan.

Q. Were there criteria that governed that redistricting effort?

A. Yes.

Q. Now, we could walk through that, but let me just pick a few highlights so we can move on. What was the population deviation criterion used in the 2001 redistricting cycle?

A. In the 2001 redistricting cycle, the population deviation was plus or minus 2 percent for House of Delegates districts.

Q. Was that a change from the previous cycle?

A. I believe in the 1991 cycle, there was a higher allowed deviation. It seemed to be that way.

Q. Okay. And what political party was -- had a majority as of the 2001 redistricting?

A. In the house, the republican party had a majority in 2001 and elected a speaker, Vance Wilkins.

Q. And who had the majority in 1991?

A. In 1991, the democratic party had the majority.

Q. And had that been the case that the democratic party had the majority prior to that?

A. Yes. As far as I know, the democratic party had had [592] the majority in Virginia since reconstruction. There may have been a period in the 1890s were nondemocrats had a controlling majority of the chambers.

Q. Now, there was a criterion in the 2001 redistricting for compliance with the Federal Voting Rights Act. Am I correct?

A. Yes.

Q. How many majority black districts were there in the enacted 2001 plan?

A. There were 12 majority minority districts -- black districts in 2001.

Q. How many were there in the 1991 plan?

A. There were also 12 districts.

Q. Were they in roughly the same regions of the state or different regions?

A. They were in the same regions in the Richmond area and the Tidewater/Hampton Roads area and also in Emporia, in that region.

Q. And there were other criteria in the 2001 redistricting criteria, correct?

A. Yes.

Q. And there's a lot of similarities between those and the 2011 criteria. Is that fair to say?

A. Yes. They are very similar.

Q. We'll talk about the 2011 criteria, but I'm just [593] trying to move through this. Were you involved in the 2011 redistricting in Virginia?

A. Yes.

Q. What was your role?

A. I was brought in to work with the majority in the House of Delegates, to work with Chris Jones and his team to draw plans for the House of Delegates.

Q. What kind of services did you provide?

A. Primarily I would work with map drawing, using the software and, again, working with Chris Jones, who's a delegate, Rob Bell, who's a delegate, and Chris Marston.

Q. Were you involved in drawing district lines?

A. Yes.

Q. And were you -- where were you doing your work?

A. I would do my work from Delegate Jones' office, also my own office in Northern Virginia and, frankly, on the road sometimes. During the redistricting process, I was in many states.

Q. Did you ever do work on Delegate Jones' computer?

A. Yes, I did.

Q. And you also had a computer with the software; is that correct?

A. Yes. I had the Maptitude software on my laptop computer. Delegate Jones had it on his laptop -- or his [594] desktop computer as well.

Q. Who did you understand that you were working for?

A. I was working for Delegate Chris Jones.

Q. Okay. And what was his role in the 2011 redistricting?

A. In 2011, he was really in charge of the whole process. He was the chairman of the P&E, the Privileges and Elections Committee, and he was tasked to handle the entire redistricting process.

Q. Were there criteria governing those efforts?

A. Yes.

Q. Let's look at those. Plaintiffs' Exhibit 16. Do you recognize this document, Mr. Morgan?

A. Yes.

Q. And what is it?

A. This is -- these are the redistricting criteria for use in the 2011 redistricting.

Q. And I see the first criterion is population equality; is that correct?

A. Yes.

Q. What was the population deviation selected in 2011?

A. It was plus or minus 1 percent from the ideal population.

Q. And that's more restrictive than in -- in 2001; is that correct?

[595] A. Yes, that's correct.

Q. And there's the second criterion. It says Voting Rights Act. Do you see that there?

A. Yes.

Q. How many majority black districts were there in the enacted 2011 plan?

A. There were 12.

Q. And in what regions of the state were those districts?

A. They were in Richmond, the Tidewater, including the peninsula, and then also in the Emporia/south area.

Q. Were there any in Northern Virginia?

A. No.

Q. Were there any in the Piedmont?

A. No.

Q. Were there any in the Valley?

A. No.

Q. Were there any in Southwest Virginia?

A. No.

Q. Do you agree that the majority black districts are scattered throughout the Commonwealth?

A. No.

Q. Are many of these districts contiguous with each other?

A Yes, many of them are contiguous with each other.

[596] Q. Let's look at the next requirement, contiguity and compactness. Was -- this is a requirement that districts shall be comprised of contiguous territory, including adjoining insular territory. Do you see that language there?

A. Yes.

Q. Was this criterion applied in the 2011 redistricting?

A. Yes.

Q. Was it negotiated at any point?

A. No.

Q. Were there any districts that are not contiguous within the definition of this criterion?

A. No, no districts are not contiguous.

Q. None of the 100 districts are not contiguous; is that correct?

A. That's correct.

Q. And then it says, "Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of Jamerson v. Womack and Wilkins v. West; is that right?

A. Yes.

Q. Was that criterion, in your view, negotiated at any of the hundred districts in the 2011 redistricting?

A. No.

Q. And what's your basis for that belief?

[597] A. The -- the districts were -- the districts were constitutionally and they were contiguous.

Q. Were they as compact at the plans upheld by the Virginia Supreme Court in those two cases?

A. Yes, they were.

Q. By the compactness scores identified in those two cases?

A. Yes.

Q. Okay. Do you -- next criterion, single-member districts. "All districts shall be single-member districts." Do you see that?

A. Yes.

Q. Was this criterion negotiated at any point during the 2011 redistricting?

A. No.

Q. Are there any districts that are not single-member districts?

A. There are no districts that are not single-member districts.

Q. Okay. Next criterion, communities of interest. And we could sit and read through all of that, but let me just ask you, how *was* this implemented in the 2011 redistricting?

A. Well, delegates discussed areas of -- you know, these communities of interest, and they were discussed, and the [598] delegates agreed upon the districts and took communities of interest into consideration.

Q. Okay. Now, on the next page we have a priority almost. "All of the foregoing criteria shall be

considered in districting process." Do you see that there?

A. Yes.

Q. Were they all considered?

A. Yes.

Q "Population equality among the districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria." Do you see that there?

A. Yes.

Q. In your view, was there ever -- let me strike that. Are you aware of a situation where you believed that the other criteria we just read through came into conflict with the Voting Rights Act of 1965?

A. Not in my understanding.

Q. Okay. And we'll talk about districts in the few minutes here, but we can move on from this. Now, we mentioned the plus or minus 1 percent population deviation. Do you recall that?

A. Yes.

[599] Q. Were there challenges to implementing that?

A. Yes. The plus or minus 1 percent deviation was lower than the 2001 allowable deviation, and that made for some more difficult rectification of the population between districts.

Q. And was the state malapportioned going into the 2011 cycle?

A. Yes. The districts from 2001, by the end of the decade, were definitely out of population alignment around the state.

Q. And where was the growth concentrated?

A. The growth was in Northern Virginia, in Loudoun County, Prince William, Stafford.

Q. So what did you do to -- what was the global strategy for resolving this problem?

A. Well, the other side of the equation -- you asked about the growth -- was that there's relative population loss in other areas of the state, in southwest, in south side and in Hampton Roads. There's relative population loss.

So what ended up happening was three districts were moved. There were two that were moved from southwest/south side and one was moved from Hampton Roads, and those districts were moved to Northern Virginia. And that's how that was rectified.

[600] Q. Why did you choose to move districts in their entirety across the state as opposed to some other way of resolving the problem?

A. Well, in this case, by removing a district, it will often allow surrounding districts to retain their cores and there would be a larger portion of their existing districts that are carried forward rather than just letting the district population -- one district just added to the next, to the next. And as you go through a region, you end up taking away a seat. But in this way, you take a single seat away and it allows their other seats to retain their cores better.

Q. So you're absorbing that shock in a few districts to avoid spreading it out further?

A. Essentially that's correct.

Q. Let's look at an example, which I believe the Court has seen before, but we're going to talk about it in a little more detail. Intervenors' Exhibit 91 at -- I believe it's 19 and 20. We have -- I believe it's Map Book 2 that has a nice before and after shot, which I find very useful myself.

THE WITNESS: Thank you.

A. Which page are you looking at?

Q. It may be 20 and 21. We may be one off.

JUDGE PAYNE: You said 19, but now you're saying [601] something else. I'm sorry. I was turned around and didn't hear you.

MR. RAILE: No. You're correct, Your Honor. I was actually right the first time. It's 19 and 20.

JUDGE PAYNE: Nineteen and 20?

MR. RAILE: Yes, Your Honor.

Q. And what is depicted in these two images in 19 and 20?

A. The first image is a -- it shows the District 10 from what we call the benchmark district plan, the 2001 redistricting. And then the second image is District 10 in House Bill 5005, the 2011 redistricting.

Q. All right.

MR. RAILE: So turn the screen to page 19.

Q. Is this -- where I'm pointing -- south of the border, North Carolina?

A. Yes.

Q. All right.

MR. RAILE: Flip to page 20.

Q. Is this -- where I'm pointing by the word Charles Town -- is that West Virginia?

A. Yes, it is.

Q. It's a bit of a hike between the two districts?

A. Yes. It's about a five-hour drive.

Q. Are there split VTDs in this district?

[602] A. Yes. In District 10 in the enacted plan, yes.

Q. How many?

A. Just a moment.

Q. And, Mr. Morgan, I see you're pointing in your book. Could you point on the screen so we can see?

A. Sure. Let me count them. There's one over here between District 32 and District 10. There's a split voting district between 87 and 10. There's a split voting district between 33 and 10. Another one in Clarke County between 33 and 10. And there's one split between 29 and 10. So one, two, three, four, five is what I see.

Q. So you moved this district across the state and then split five VTDs in this district; is that correct?

A. That's correct.

Q. Why so many?

A. Well, what I'm pointing out when I recited those was that there's one split between each of the districts and then there's an additional split in District 33. So there's splits to equalize the population between District 10 and the other districts.

Q. Okay. Are there split VTDs throughout the entire plan?

A. Yes.

Q. Do you know approximately how many?

A. A little over a hundred.

[603] Q. All right.

A. Maybe 115. I don't know off the top of my head.

Q. Okay. That's fair enough. So you say there's a split between this district and each -- and several surrounding districts; is that right?

A. Yes.

Q. Why is that significant?

A. Well, it's significant because the population was rectified between these districts by splitting the VTDs.

Q. And when you're doing that, are you just looking at 10?

A. No. I'm looking at the other districts so that it's not just the population of 10 that's equalized. It's the other districts that are rectified or equalized between -- by doing these splits.

Q. So in the split between 10 and 87, the population equality issue that you may be rectifying could be in 87 or it could be in 10 or it could be in both?

A. Yes. That's correct.

Q. Okay. And so if I'm going to resolve a population deviation problem with -- where 87's population is a problem, then it would have to be contiguous with 87; is that right?

A. Yes. That's correct. So for 87, if there's a population imbalance, then the -- the VTD that would be [604] split would have to be contiguous with 87.

Q. Okay. And what factors, then, do you use to determine, from that starting point, where along a district boundary to do the split?

A. There can be many factors that determine where the split is made. Ultimately, when the split is made, it's split along census block lines.

Q. And when it's split along census block lines, why does that matter?

A. Because the shape of the census blocks determine what the boundary of the split in the voting district would be. So the underlying census blocks that are the building blocks below the level of voting districts determine what the shape of the split would be.

Q. Do all census blocks have the same number of people?

A. No.

Q. How does that factor into the split of a VTD?

A. Well, each census block will have some population that is counted in that census block. In some cases, there will be a census block with zero population, but that's recorded as zero population. So every census block will have a population value, and, you know, ultimately, those census block populations are added up, and they are either in one district or the other district.

Q. And so do you have to find a place where those blocks [605] work out to equalize the population on both sides to end up drawing that line there?

A. Yes. The population would have to work out. You could consider them a little bit like Lego blocks.

They are different shapes and sizes, and there's, you know, different population values. But ultimately, those pieces have to come together, and, again, the population is either on one side or the other of the district.

Q. Sort of playing with Legos to identify where they are going to fit out to make that equality work out; is that right?

A. Yes. That's one way of looking at it.

Q. Did you make a demonstrative for the Court to illustrate this issue?

A. Yes, I did.

Q. Did you make one on this district here, District 10?

A. Yes, I did.

Q. Can we look at that?

A. Okay.

MR. HAMILTON: Objection, Your Honor. Before we play this, this was not produced in discovery. We were handed it on the first day of trial on a flash drive. I've never seen it before in discovery, and we never had an opportunity to examine this witness on it.

MR. RAILE: Your Honor, this --

[606] JUDGE PAYNE: The rule on demonstratives is they don't have to be produced in discovery.

MR. HAMILTON: It's not a proper demonstrative --

JUDGE PAYNE: Well, then it --

MR. HAMILTON: -- Your Honor. It's a videotape.

JUDGE PAYNE: Well, I don't know what it is yet. What is -- tell me what it is and let's see.

MR. RAILE: This is a -- a screenshot playing of this VTD being assigned the blocks between these two districts. I believe it's 29 and 10. All of that data and information is in -- in the record where that line is, and it's just showing the blocks being assigned. And I would add, I would offer --

JUDGE PAYNE: A screenshot is not a videotape. He says it's a videotape.

MR. RAILE: It's a moving screenshot.

JUDGE PAYNE: You mean as if you were drawing a cartoon?

MR. RAILE: Correct. I think I understand Your Honor correctly. And so --

JUDGE PAYNE: Yeah. That's old technology. Sorry.

All right. Let me -- let us see what it is first because I don't -- I don't understand it.

[607] MR. RAILE: This is the --

JUDGE PAYNE: Play it -- start it playing, or whatever you do, so we can get some notion of what it is. Don't talk about it, Dr. Morgan. We just want to see what it is.

MR. RAILE: Yes, Your Honor. It takes a little bit to get moving. This isn't the most exciting film you're ever going to watch.

JUDGE PAYNE: And there's narrative to go with this? Is that what you're saying?

MR. RAILE: Well, that will come from our witness.

JUDGE PAYNE: I understand that, but he's going to talk about it?

MR. RAILE: Yes, Your Honor.

JUDGE PAYNE: Okay. Do you understand what it is now? All right. So what else? I see what -- we see what it is now. And why is it an improper demonstrative exhibit in this world?

MR. HAMILTON: This is -- this is one of two or three of these that we're going to see. This one doesn't involve a challenged district. It's got all these political values on the side. Maptitude has a lot of data on it. You can see the districts selected across the top of the screen. You can see political data listed on the [608] side of the screen. If they were going to use an exhibit by this, it's being offered as substantive exhibit. This is -- especially when we get to the ones that they're going to offer with respect to the challenged districts, we haven't had an opportunity to examine Mr. Morgan.

We had -- we took a deposition of Mr. Morgan, and we had a bunch of materials that were produced. This was not in there. So we don't have an opportunity to say, well, wait a minute. You know, you changed this filter there or you changed that filter and how would that change things because we never had an opportunity to examine him at the time.

JUDGE PAYNE: What does the pretrial order or the pretrial protocol say about the exchange of demonstrative exhibits? Was there something in the order that said that, when that was to be done?

MR. HAMILTON: It was to be done in advance of trial. And so the parties agreed that we would exchange demonstrative exhibits on the first day of trial before the trial began, and we did.

JUDGE PAYNE: All right. So you agreed to this?

MR. RAILE: Yes, Your Honor.

MR. HAMILTON: We agreed to the change of demonstrative exhibits. We didn't agree to this exhibit. We hadn't seen it before, Your Honor.

[609] JUDGE PAYNE: Well, I understand that, but you hadn't seen any of the other demonstrative exhibits that they did either.

MR. HAMILTON: That's correct, Your Honor. And, of course, we didn't object to them either.

You'll recall at the beginning of the 2015 trial there was a big blowup. I tried to use it in opening statement. Mr. Braden objected. You said, well, he objected so you can't use it. So we put it down.

JUDGE PAYNE: I ruled on that basis? I mean, that's really not a good reason; just he objected.

MR. HAMILTON: I would never criticize, Your Honor, for his reasoning for --

JUDGE PAYNE: Here's -- I think the bottom line is it doesn't have to be produced in discovery under the pretrial orders that we entered in the case. It had to be produced on the first day of trial as a demonstrative, and it was produced. And so you all have agreed to that schedule. I think you're bound by it and the consequences that come with it.

MR. HAMILTON: Well, I would -- I completely agree with that, Your Honor, if it's a proper

demonstrative. I don't think this is being offered as a demonstrative. This is substantive evidence. This is an example of a document being offered for substantive [610] purposes and being labeled as an illustrative exhibit. It's not.

JUDGE PAYNE: Well, he hasn't offered it yet. So it's to aid this man's testimony, and I think the objection is overruled.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: And if he offers it as a substantive exhibit, you'll have a different issue entirely. And you have your objection if he does that.

MR. HAMILTON: Thank you.

JUDGE PAYNE: All right. Go ahead.

MR. RAILE: Can we roll the tape back?

JUDGE PAYNE: Huh?

MR. RAILE: Sorry. I'm talking to -- my apologies, Your Honor.

Q. All right. Before we begin, can you just describe to the Court what is this that's in front of them?

A. This is a view of the Maptitude software, and there's different parts to this view. This -- at the very top there's a summary of all the districts in the plan. And I'm just going to -- if I can mark on this, I'll just point where that is.

So at the top of the page, that is the summary of information about each district. And there's a list, and I'm going to point over on the right side, you can scroll [611] down this list to see the values for any district. And then the window where you see the map shows the map. And in this case, it's zoomed in on the area

surrounding District 10 in the enacted plan. And there's just a couple more pieces to describe of this.

Over here is a toolbox for redistricting, and what this shows is how the process is done of assigning geography from one district to another or if it's -- when you begin a plan, you may begin with unassigned territory. And then there's another toolbox that has to do more with the zooming around of the -- of the map window. And then the last box here on the left side is the pending changes. So you would consider this as a "what if." So when you see, in a moment, if you select geography to put from one district to another, the software calculates the effect of that change before you actually affirmatively click it in and say make this change. So you can see what the proposed change would be and what its effect would be in drawing the plan. So those are the different parts of this display.

Q. Okay. Now, before we play it, I see that we're looking at a similar part of the state where District 10 is; is that right?

A. Yes.

Q. In fact, there's District 10 in yellow; is that [612] right?

A. Yes. District 10 is in yellow, and then the outlines in green show the localities, the counties and independent cities. And the blue lines in this display show the boundaries of the voting districts. And then the -- the district boundaries are shown with the color theme.

Q. And I notice that House District 10 is mostly in its final form. Am I right?

A. Yes. In this case, District 10 is in its final form in the enacted plan with one exception. On the western edge of the district in Frederick County, near the city of Winchester, there is one voting district, Parkins Mill that is entirely assigned to District 10. And as a result of that, if you look below the number 10, you'll see that the number below that is 1870. That's the deviation over the ideal. So at this time District 10 is over the ideal population by 1870 people, and then that expressed as a percentage is 2.34 percent. So that's the deviation at this time is plus 2.3 percent, which in this case, is over the allowable plus or minus 1 percent. Here it's on the high side.

And then the other district, District 29 -- and the label reflects that the district label 29 is the district. Below that is the population deviation. So it's negative 1422 people, and then that as a percentage is negative [613] 1.78 percent.

Q. Now, the district is mostly in its final form. And when do VTD splits typically occur in the process?

A. In my experience here in Virginia, the splitting of VTDs would occur later in the process. A lot of drafts and possibilities were explored and the VTDs, the voting district splits, were usually done later in the process.

Q. So, obviously --

JUDGE PAYNE: Later after what is done?

THE WITNESS: After the general -- Your Honor, after the general district boundaries are worked on, perhaps at the voting district level or at the county level, there's a general composition of the district. And it might be, at one time, outside of the population

deviation. So in this case, the splitting of voting districts at the census block level rectifies the population.

Q. So by this point, have most of the major decisions about this district and the surrounding districts already been made?

A. Yes.

Q. And so we don't have a time machine. We can't go back and watch you draw in 2011, but is this scenario where the district is mostly complete, the surrounding districts are mostly complete realistic as to what you [614] were doing then?

A. Yes.

Q. Okay. Let's push play and watch what happens.

A. Do you want me to speak? I'm sorry. Do you want me to speak while this is playing?

Q. What's going on here? Let me ask you. A Sure. In this case I'm zooming in to District 10 and looking around the district boundary. And then I'll move over towards District 29. And on the redistricting toolbox, I'm selecting the district target as 29, meaning that the population that I'll be selecting will ultimately be going into District 29, and that's the box over here where I mark a dot. And then just to be clear, that I'm only going to be taking population from District 10.

Q. Can you show us where the whole -- can we pause it for a second? Can you show us where the --

A. Please hold, if you would hold here for one moment.

Q. Okay. What do you see here?

A. I just wanted to point out that at this point I've selected this layer block, which allows me to bring in another layer. So I'm going to add in the census block layer, and that will come up next.

Q. So at this moment we do not see census blocks on the screen, and you're about to change that; is that correct?

[615] A. Yes.

Q. So let's play it and watch. So what just happened?

A. Those are the census blocks that are underlying the voting districts. Those are the shapes of the census block, and there's a value on them, and that's the population -- total population of that census block. And I'm selecting those portions --

Q. Well, let's pause right here because I do have a question to ask you. What's the VTD -- is this a whole VTD or what are we looking at?

A. The VTD Parkins Mill is here and continues on into District 10. So Parkins Mill is that entire section. And what I'm doing here is I'm selecting these census blocks to assign them from 10 here to District 29, and at this time they're not actually assigned. So what's happening is this change box is showing me that if you were to put that -- this portion of that voting district, just that portion, into District 29, the population and other information is here in this box. And it shows you that the new District 29 would have the characteristics that are listed here on the side --

Q. Well, let me cut you off one second.

A. -- and the old District 10 would have those characteristics.

Q. I apologize. I just want to move through this. I [616] want to address one other thing before we get to the change box. This highlighted thing here, block'ish thing?

JUDGE PAYNE: The highlighted thing is in orange, for the record.

MR. RAILE: Yes, Your Honor.

Q. What is that?

MR. HAMILTON: Your Honor, if this is an illustrative exhibit, I don't think it's in the record.

JUDGE PAYNE: I thought you wanted it in the record so you could see if we erred in letting it in. I'm sorry.

MR. HAMILTON: No, I don't. I don't intend --

JUDGE PAYNE: I mean, okay. If you're not going to raise it on appeal, okay.

MR. HAMILTON: Well, no, I'm not saying that, Your Honor. I'm saying if he hasn't offered it as an exhibit, I don't want it --

JUDGE PAYNE: I understand that. But you put things in the record as rejected exhibits and they are put in in that way; for example, to preserve objections. You can do the same thing with the caveat that it's something that can't be considered as a piece of evidence if you want it in to preserve your objection. If you don't want to, forget it. It's okay with me.

MR. HAMILTON: Thank you, Your Honor.

[617] JUDGE PAYNE: Okay.

Q. Okay. This highlighted block in orange that has the number 15 in the middle, what is that?

A. That is a single census block.

Q. And this yellow highlighted thing below it that I'm drawing around right there that has the number 150 in the middle, what is that?

A. That's another census block that's currently assigned to District 10, and it's not been selected for movement yet.

Q. Okay. And what does the number 15 mean?

A. That's the population of that census block.

Q. There was 15 people in that census block, according to the 2010 census, correct?

A. Yes.

Q. And this block says 150. What does that number mean?

A. That's the population of that census block.

Q. Okay. So more people live in the 150 block than in the 15 block; is that right?

A. Yes.

Q. Okay. Could I –

JUDGE KEENAN: Excuse me, counsel. Could you clarify for the record whether this is voting age population or just simply residents of all ages?

MR. RAILE: I'll let the witness answer that.

[618] THE WITNESS: Yes, Your Honor. This is total population, and that is the variable that we would be equalizing with the plus or minus 1 percent.

Q. Could I split this VTD like this where I'm drawing my line?

A. It would not follow the census block boundaries, and you really could not do that in the software.

Q. Okay.

JUDGE PAYNE: When splitting it in the software, you have to follow census block boundaries. Is that what you're saying?

Q. Is that correct?

THE WITNESS: Yes, Your Honor.

Q. All right. Let's keep playing and watch as more get highlighted. And what's going on here, Mr. Morgan?

A. More census blocks are selected for transfer from District 10 to District 29. As this is happening on the change box, the numbers update as these selections are made.

MR. RAILE: Let's pause --

JUDGE PAYNE: The purpose of this anticipated transfer is population equalization?

THE WITNESS: Yes, Your Honor.

Q. And what is the first item in this change box, TOTPOP?

[619] A. Over here in the change box, this TOTPOP is the total population of the district. And there's a value for District 29, 79,504. And this is the -- the newly updated, which hasn't happened yet, this would be the district population for 29. Next to it is the district population for District 10, 80,964.

Q. And what's in the next line?

A. The next line shows you how much population is being transferred. It says Change in Total Population. And so it shows that 916 people are moved from District 29 -- yeah, from District 10, rather, to District 29. So the value is positive to District 29 and negative to District 10. So it's the exchange of that many people.

Q. At this point in time are the districts -- are the equal population problems in the district rectified?

A. No. Because the next two -- the next two rows show you the deviation of the proposed new district and the deviation is negative 506, 506 in 29, but it's 954 on the positive side for District 10. And immediately below that, it shows that it would be a negative .63 for 29, which is within the population allowance. But District 10 is not. It's 1.19 percent overpopulated. So more population would need to be transferred in order to have both districts within plus or minus 1 percent.

Q. So you're going to have to keep going to accomplish [620] your goal, right?

A. Yes. I will have to continue to add census blocks and their populations to allow these districts to be within plus or minus 1 percent.

Q. And will that determine, in part, where the final line ends up?

A. Yes. The shape and the geography of the census blocks and the populations, in combination, determine where the final line is.

Q. Now, this census block here that I'm pointing to with the number 146, could you have chosen that?

A. In this case, no, because it's already in District 29. So trying to add that to a -- to the district wouldn't work because it's already in the district.

Q. Okay. And there are a few lines here, here, here, here, here. G05L_RV and similar wording in the following lines. What are those?

A. Okay. So in the change box, there's political data in this area. So the information there, G05L_RV is the general election 05, 2005, L for Lieutenant Governor, underscore, RV for the republican vote. So this is the republican vote estimated in that district -- or that new district for Lieutenant Governor 2005. And then down below that, it says change in the republican vote in that -- that section. So effectively, it would be [621] transferring 96 republican votes.

And then below that is the D vote, Lieutenant Governor 05, this is Bill Bolling was the republican candidate, and I believe Leslie Byrne was the democratic candidate in 2005. And so that's her vote is 6921, and then the change in her vote it would be 51. And then this also shows the percentages. So the democratic percent for Lieutenant Governor is 40 percent in District 29.

Q. And are those numbers very similar to what you would see in redistricting in all the districts in 2011?

A. Yes.

Q. Are those numbers that you took account of in drawing districts in 2011?

A. Yes. The political data here is -- was also in the 2011 redistricting software.

Q. Now, a few minutes ago I thought I heard you use the word estimate. What did you mean by that?

A. The political data is brought into the Maptitude software, and the political data ranged from 2001 through 2010. During that process, what we referred to as the VTDs, the voting districts, may have changed so that the 2001 precincts are not precisely the same as the 2005, 2007 or 2009 precincts.

So an effort is made to take the precinct level data and de-allocate it, or assign it to the block level, and [622] then that block level data is available for this redistricting software.

JUDGE PAYNE: Block level meaning census block level?

THE WITNESS: Yes, Your Honor.

Q. So the Census Bureau doesn't report the political performance data from the census block level, correct?

A. That's correct.

Q. And the way that you bring it to the census block level is by deaggregating it; is that correct?

A. Yes. And as I pointed out in the statement I just made, the voting precincts, the voting districts are not consistent for every election. So in 2001 there may have been -- there may have been, say, 20 voting districts in Frederick County, but in 2009 there might be 23 voting districts. And the data for those elections are reported in the new voting district boundaries. But over the decade for this redistricting software, all of that information is brought into the same database.

Q. Now, even though it's an estimate, that number appears on your screen when you're drawing as a change; is that right?

A. Yes.

Q. And that's the number you're looking at in drawing the districts, right?

[623] A. Yes.

JUDGE PAYNE: What is that number --

MR. RAILE: The political --

JUDGE PAYNE: I'm asking him.

THE WITNESS: Yes. At this time we're discussing the estimated political data in the portion of the voting district that is going to be put into District 29. And, again, the change box shows what the new District 29 would look like and what the new proposed District 10 would look like with that political data change.

JUDGE PAYNE: So in drawing VTD splits, you are considering political data as you've -- the political data that you just described; is that correct?

THE WITNESS: Yes, Your Honor. That data is available in the software.

JUDGE PAYNE: Is it considered?

THE WITNESS: Yes.

Q. Let me ask a follow-up question. In most split VTDs, are you doing it for political reasons?

A. Usually that's not the case.

Q. Why is that?

A. Because at this level it's usually for population equality purposes to equal out the districts.

Q. Are these numbers large or small that we're talking [624] about here?

A. In most cases, they are small numbers of population and small numbers of political data.

Q. So it factors in to the political performance of the entire district; is that right?

A. Yes. The political performance of the entire district has to take into account these splits in order for a value to be calculated for the entire district. So, for example, in this case, there are VTD splits and there is political data reported in the software and the Department of Legislative Services also reported political data as a summary when they did their reports on the plans that were proposed during the redistricting process in Virginia.

Q. But as to most specific splits, are the numbers large enough to impact the political performance of a district in a meaningful way?

A. Usually there would not be enough -- a lot of numbers that would be moved around. There are some large voting districts, and if one were to take most of that voting district in, say, you know, a large number, then it might affect the political performance. And that's how I would answer that.

Q. So sometimes yes, but typically no?

A. Typically no.

[625] Q. Okay. What's this line here, TOTVAP?

A. TOTVAP is the total voting age population in the proposed District 29 and the proposed District 10 in the change box.

Q. I think this goes to Judge Keenan's question a few moments ago. You have total age population available in that box; is that right?

A. Yes.

Q. So that's where it appears. What's this one BLKVAP?

A. That and the one above it, the BLKVAP is an abbreviation for black voting age population. And the one above it is the change in total voting age population, and below it is the change in the total black voting age population. And, again, this is referring to the portion of the voting district that would be moved into District 29 from District 10.

Q. Do you see down here there's one that says DOJBLKVAP? Do you see that there?

A. Yes.

Q. What is that.

A. That is the abbreviation for Department of Justice black voting age population.

Q. You have two different calculations on your screen?

A. Yes.

Q. Are these the two different calculations you had on [626] your screen in 2011?

A. Yes. They were available from the Census Bureau.

Q. Do you know the difference between the two?

A. The black voting age population, as I understand it, is black voting age population. And then the DOJ black voting age population is a

combination of non-Hispanic black voting age, in combination with blacks of other -- black and white or other races.

Q. Are you aware that the Virginia Division of Legislative Services has a method of calculating black voting age population?

A. Yes.

Q. Is that on the screen here?

A. No, it's not on the screen here.

Q. Was it on the screen in 2011 when you were drawing?

A. No.

Q. Is it anywhere in that software program?

A. No.

Q. Okay.

MR. RAILE: Let's keep playing the video.

Q. What are we going to see next here?

A. Selecting more blocks, census blocks for transfer from 10 to 29.

Q. It looks like you're zooming in there; is that right?

A. Yes.

[627] Q. So you just clicked one that's 15?

A. Yes.

Q. And the one next to it here is 202?

A. Yes.

JUDGE PAYNE: Are you talking about the number of the census block or are you talking about the number of the votes in the census block?

THE WITNESS: Your Honor, it's the population in that census block.

JUDGE PAYNE: Population.

Q. So when you click on this block, you get 15?

A. That's correct, 15 people.

Q. You click on this one, you get 202?

A. Correct.

Q. And you have to take that into account when you're choosing where to go?

A. Yes. That's correct.

Q. So you just clicked one that said 8; is that right?

A. Yes.

Q. And where are we on the deviation now?

A. The deviation on District 10 is positive 1.2 -- 1.02 percent, 820 people. And as we click in that 202 census block, it will be 202 people less in District 10.

Q. Okay. So that will bring us to equality; is that right?

[628] A. Yes. That's correct.

Q. And you have a zero here and a zero here that I'm pointing at?

A. Yes. This is near the Interstate 81 interchange, just south of the city of Winchester.

Q. This demonstrative is almost finished, but we're at population equality. So are you going to stop here?

A. In this case, as far as in the enacted plan, the voting district split continued down along I-81 to the

border with another voting district, and that's where it was stopped.

Q. Why did you do that?

A. It -- it just made sense to bring it down to the voting district. It doesn't affect a lot of people. It divides along the I-81.

Q. So you pick a road that you think makes sense and looks esthetically pleasing to you; is that correct?

A. Where it's option -- where there's an option to do that, yes.

Q. Okay. Where might there not be an option to do that?

A. If these districts were both at the absolute extremes of the population, there not be an option to further rectify the population. For example, if both were at negative 800 and they were balanced at 800, that's at the extreme of negative 1 percent. There really wouldn't be a [629] way to add additional population between them. They have to stay basically where they are or --

Q. The numbers --

A. Pardon me. If there were a block that would change that result is what I'm saying.

Q. And right. And here we have three people and six people?

A. Correct.

Q. So these are big geographic areas that have very few people, right?

A. That's correct.

Q. And so this is something you can do fairly easily; is that right?

A. Yes.

Q. And you just do it because it looks nice to you?

A. Yes.

Q. Did you discuss this VTD split with Delegate Chris Jones?

A. No.

Q. Did you discuss many VTD splits with Delegate Chris Jones?

A. Not many.

Q. Why not?

A. In most cases, he asked me to equalize the population. He would have the general framework of a [630] district, and he would say, you know, bring this up to population.

Q. So that move where we saw you pick a 3 person census block and a 6 person census block, that's something that you can do on your own without authorization?

A. Well, yes. But I would clarify that I -- Chris Jones would have access to all of this. In some cases, I would be making the changes on his computer. So he would see the results of this work.

Q. Right. So he could come in and say, I don't like the way that looks, and do something different?

A. That's correct.

Q. Okay. Are there VTD splits in the challenged districts?

A. Yes.

Q. Did you use a different VTD split process in those districts than the one we just saw?

A. No.

Q. Do you have a demonstrative of a split in a challenged district to illustrate that?

A. Yes.

MR. HAMILTON: Same objection, Your Honor.

JUDGE PAYNE: Same ruling.

Q. So we have the second demonstrative up here, and I'll represent --

[631] JUDGE PAYNE: Do you want to flush out your objection a little bit more now that we're talking about the challenged districts?

MR. HAMILTON: Yeah. Again, this is being offered. This is not a proper illustrative exhibit. The last one was simply an effort to show how it is that the map works, and I can understand how that can be offered for nonsubstantive purposes. He's just simply explaining how it is that one uses Maptitude.

Now we're talking about what actually happened, but this isn't what actually happened. This is like showing a cartoon trying to reconstruct something in the past. Mr. Morgan could have been offered as an expert. He's testified before this court, you'll recall, Your Honor, in the Page case as an expert, but he wasn't here. And he's not an expert, at least not the purposes of his testimony. So --

JUDGE PAYNE: So what is the objection? That's still what I'm trying to get a handle on.

MR. HAMILTON: The objection is it's an undisclosed substantive document that was never

produced in discovery. We never had an opportunity to examine Mr. Morgan on what this is -- about what we're about to hear in order to allow us to test his testimony. Instead, it was, you know, marked as an illustrative exhibit and [632] identified at the last minute at the beginning of trial.

JUDGE PAYNE: But that's what you all agreed to.

MR. HAMILTON: Well, we --

JUDGE PAYNE: Wait a minute. So your point is that it's not really a demonstrative exhibit? That's the objection.

MR. HAMILTON: That's the objection.

JUDGE PAYNE: What do you have to say to that now that we've got the issue crystalized?

MR. RAILE: Your Honor, there's no way we can go back in time and record Mr. Morgan drawing the VTDs. He's going to have to say -- and there's no way that anyone can conceivably remember every single VTD split and why this zigs there and that zags there. This is a good way to say this is generally how it's done.

JUDGE PAYNE: Well, he told us that.

MR. RAILE: The Court is capable of understanding that we are not watching John Morgan split this VTD in 2011. That is not happening. What we're watching is that is how this is done. This is the considerations --

JUDGE PAYNE: What are you offering it for? We know -- I think we all understand you're not trying to

replicate exactly what he did. Why are you now going district by district?

[633] MR. RAILE: We are not going to do all of this. I just want to show a -- in 10, this is a district where no one is conceivably contending that race is a factor in those VTD splits. He is going to testify, I believe, that what he did in the challenged districts is no different --

JUDGE PAYNE: Well, he can testify to that.

MR. RAILE: So I think having an illustrative exhibit to show what that actually looks like and how those considerations --

JUDGE KEENAN: You're saying you want the challenged districts also, you're saying.

MR. RAILE: Just one.

JUDGE PAYNE: To show how it was done? Is that what --

MR. RAILE: To show that it's not done in any different way than we just saw.

JUDGE KEENAN: Well, he's already said he uses the same methodology, you see. But let me tell you what's concerning me about it. I think you've done a really good job with this witness of explaining how complex this process it. It's incredibly nuanced, very fine-tuned and not easy to do. And -- and so I think you've done what you need to do as far as a demonstrative exhibit to show how the methodology and process works.

My concern is that if you're going in with the [634] additional exhibits related to the challenged districts,

then you're talking about content rather than process. And that's my concern.

JUDGE ALLEN: I agree.

MR. RAILE: Your Honor, the -- we had testimony from Dr. Rodden and Dr. Palmer, to some extent, telling us that the maps that they were looking at -- they weren't there -- the maps that they were looking at illustrated racial predominate -- racial predominance, I guess. They said it wasn't motive. I don't understand that. But something -- predominate racial factoring or something like that.

And what we want to show is that those zigs and those zags that they are talking about are census block lines and you can't just reach out and grab individual people in the way that they're suggesting. They are looking at the wrong thing. And it helps -- you can say all that and I think it helps as a demonstrative to illustrate it.

MR. HAMILTON: Your Honor, I mean, I think the point Judge Keenan made is exactly right. This is -- now we're going to the substance of it. The -- he's already testified that the process was the same and --

JUDGE PAYNE: That's not the point he's offering it for now. He wants --

MR. HAMILTON: He want --

[635] JUDGE PAYNE: Wait a minute. He wants to have something to have the witness show us that what Dr. Rodden said isn't possible. Isn't that what you're saying?

MR. RAILE: Almost, Your Honor. I would flip it. What Dr. Rodden said is impossible is, in fact, possible.

MR. HAMILTON: And I would have no objection, Your Honor, if what we were offering -- if it was something like this. And we've seen a lot of these, and they were all marked in advance. And they were offered as substantive evidence. So if we want to show census level blocks, that's not a dispute. The map is what the map is. That's not what this is. This illustrative exhibit is a video offered for substance.

JUDGE PAYNE: Objection sustained. He can talk about it, but you can't use the video, or whatever this thing is.

MR. RAILE: Thank you, Your Honor.

JUDGE PAYNE: You can ask him the question, and I don't know that you have asked him the question yet. You've said he's going to testify to it, but he hasn't --

MR. RAILE: Agreed, Your Honor. Just give me one second to just think through the most effective way to do this.

Let's look at Dr. Rodden's report, which is I believe [636] Plaintiffs' Exhibit 69. And I believe the page I'm thinking of is 47.

JUDGE PAYNE: Do you have a copy of it over there?

MR. RAILE: We have witness binders for Mr. Morgan, and his report in that. And 47 is the page I was thinking of.

JUDGE PAYNE: So look in your witness binder?

MR. RAILE: Mr. Morgan -- we have witness binders that say John Morgan.

JUDGE PAYNE: We've got them.

MR. RAILE: And there is -- I believe there's a Rodden report.

JUDGE PAYNE: Okay. Sixteen -- or 69, I mean.

A. Yes, I see this.

MR. RAILE: Let's zoom in on the map.

A. What page again?

Q. Forty-seven. Do you recognize what's in this image?

A. Yes.

Q. What is it?

A. This is a zoomed in view of Newport News and the enacted District 95 and the surrounding territory.

Q. And do you recognize -- can you point to the line that is the enacted district --

A. Sure.

[637] Q. -- on the screen?

A. Sure. The only thing that this is showing with the line, it doesn't show the surrounding districts. In this case, it's only showing the enacted District 95, which follows this line.

Q. Okay.

JUDGE PAYNE: This is just part of 95?

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: It's the northern corridor.

THE WITNESS: Yes, Your Honor.

Q. When you are drawing the map, is that what you see?

A. No, that's not what I see.

Q. Is it even possible to produce something like this on the Maptitude screen?

A. I did not do that. I don't believe, in the way that Dr. Rodden described it, it would have been done.

Q. Okay. Could you produce an image like this?

A. As I understand the way he's doing this, he's randomly placing dots to indicate population. So I would have some difficulty doing this if there were a function that could do this, perhaps, but it's not something that I would have produced.

Q. Is this something that you ever used in 2011?

A. No.

Q. Okay. Where -- well, let me ask you this. What's [638] missing from this picture?

A. What's missing from this picture is the boundaries of the other enacted districts and the census blocks.

Q. Okay. So this doesn't show us which black dots and white dots are bound to which other black dots and which other white dots; is that right?

A. Yes. And more to the point on this, as I understand it, Dr. Rodden was saying that the dots are randomized within the boundary of the census block. So in that sense, as I understand it, those dots are not showing the location of population within a census block, only the random distribution of a number that is represented by a dot.

Q. So if you want to draw this person in that dot that I just threw on there, do you have any way of doing that when you're drawing the map?

A. That dot is not a population person. It's not a population value. It's a dot representing population. It's not tied to a geographic location.

Q. But even if it was, would you have any way of grabbing that dot?

A. No.

JUDGE PAYNE: Grabbing it?

Q. Grabbing it into a particular district, assigning that person or that representation of a person, which [639] isn't actually tied geography; is that right?

A. That's right.

Q. So if the census block is shaped like this, you don't really have a choice about where that line is, do you?

A. That is correct.

Q. So wherever these lines end up is not something that you have a lot of control over, is it?

A. The lines, as they are expressed here, are defined by the underlying census block geography.

Q. Do you recall the census block shapes and sizes in this north area just north of the northern boundary of the district that I've marked here above the Epes precinct?

A. Yes. That portion is in the Reservoir voting district.

Q. Why did you draw the district out to the west and -- and by "the district," I really mean the split, because Reservoir is split; is that correct?

A. Reservoir is split between District 93, 95 and 94.

Q. Why did you take this western section into 95 rather than just go north? Do you recall?

A. Yes, I do. In this case, the census geography immediately to the north has small populated blocks in this section and larger populated blocks here.

In fact, this is roughly -- the second box I'm drawing is roughly the boundary of a single census block [640] with about 900 people in it, which is more than 1 percent of a district. So effectively, while it would be possible to take smaller population blocks down here, at some point you would encounter that larger block and it would fall out of population deviation. Therefore, in this case, the area over to the northwest where it says Reservoir was taken in. The underlying census geography allowed for that.

And more to the point, I remember this specific indentation is a single census block, and that was left out of District 95. Even though it might have been possible to align it, it wasn't possible because of the underlying population of that census block.

Q. So that census geography is actually telling you -- combined with the one person, one vote, plus or minus 1 percent deviation, combined together are actually governing where you're taking this district?

A. Yes.

Q. And that tells you why this is split the way it is?

A. Yes.

Q. If you don't take that factor into account, can you understand why you did what you did in 2011?

A. I don't think so, no.

Q. And that phenomenon, is that going on across 100 districts around the state?

[641] A. Yes.

Q. Including in the 12 majority black districts; is that right?

A. Yes.

Q. All right. We can move on. All right. Let's talk about districts. And what regions of the Commonwealth are the challenged districts in?

A. The challenged districts are in Tidewater area, including the peninsula, and Richmond and in the area between -- from Petersburg down to Emporia.

Q. Did you understand there to be regions of the map when you were redistricting in 2011?

A. Yes. In redistricting, we worked with regions and there would be plans drawn in regions so that people could work on them simultaneously. So one delegate or one of the map drawers could work in one region and another map drawer could simultaneously work in another region.

Q. So there's drafts going back and forth and people are contributing different parts and having different input; is that right?

A. Yes. That's correct.

Q. And you're right in the thick of it; is that right?

A. Yes. The -- there's a lot of activity.

Q. Okay. Let's talk about the Hampton Roads region, and we can look at Intervenors' Exhibit 96 to 97 to give us a [642] start.

MR. RAILE: And, Your Honors, my recommendation for viewing this, what works well for me is to open Map Book 1, and it actually has the 96 and 97 together so that you can actually see before and after on the page. We can do that on the screen as well.

JUDGE PAYNE: Ninety-six and -- Exhibit 96, page 1 and Exhibit 97, page 1; is that right?

MR. RAILE: Yes, Your Honor. And we're actually going to flip from there to page 3.

A. Is this what I'm looking at?

JUDGE PAYNE: We're going to what page.

MR. RAILE: It's page 3. It's South Hampton Roads.

JUDGE PAYNE: So we are on Defendant-Intervenors' Exhibit 96, page 3.

MR. RAILE: My recommendation would be to have this open as we go through the region the whole time because it helps to go big picture and zoom in, and we'll be doing some of that.

Q. Mr. Morgan, what's going on in the South Hampton Roads region going into the 2011 redistricting?

A. In the South Hampton Roads region, there was a relative population loss relative to other areas of the Commonwealth. So what's essentially happening is in the [643] region we're looking at here, which includes Norfolk, the city of Norfolk, Virginia Beach, Chesapeake, Portsmouth City and Suffolk City, in the page 3 map, which is the benchmark district plan, if I count them up, I believe there are 15 districts represented here. I believe that's the case. Also

including district 100. And in the enacted plan, there are 14 districts in that same region as I defined it.

Q. Why is that?

A. There's not enough population to support the same number of districts. So in this case, rather than, for example, continue to take population away from the region to support 15 -- from other regions, rather, to support 15 districts, one district was collapsed and moved to another part of the state. And that district was District 87.

Q. Can you point on the screen where we have the two maps side by side to District 87?

A. Yes. This district here entirely in the city of Norfolk along the Willoughby Spit, that's District 87.

Q. And, Mr. Morgan, I'm pointing to the territory just -- whoops -- just to the west of 87. What is that?

A. That is a portion of District 100, which in the benchmark plan included the Eastern Shore entirely. So Accomack and North Hampton Counties, which comprise the Eastern Shore, and a portion of the city of Norfolk, in [644] this case, primarily the naval base of Norfolk. And that was the E benchmark District 100, which in my discussion of 15 districts, I'm including in this because it is connected to the Eastern Shore.

Q. This crosses the Chesapeake to 100, which is the Eastern Shore, right?

A. That's correct.

Q. Why does it cross the Chesapeake?

A. Because the Eastern Shore, by itself, was not enough to form a district within the plus or minus 1 or even plus or minus 2 in 2001 population. So it needed to have additional territory brought in, and that had to come from somewhere across the Chesapeake Bay.

Q. Couldn't go into Maryland; is that right?

A. That's right.

Q. Okay. So 87 comes out, move to Loudoun County, if I'm not mistaken?

A. Yes. Eighty-seven was moved to the south riding area of Loudoun County.

Q. What happens next?

A. I would describe this as District 87 was combined with 100, or another way to look at it was the territory which previously comprised benchmark District 87 has been moved to other districts. So the effect of that is that there is surplus population around that area of Norfolk [645] available to build other districts with. And so, again, in this case, the territory that was in the previous District 87 was divided in the enacted plan, HB 5005, between District 83, District 100 and District 79.

Q. Okay. Where is District 79 in the benchmark map?

A. District 79 in the benchmark map in this plan is -- is in Portsmouth, Suffolk, Chesapeake and parts of Norfolk City. And that's where District 79 was. It's in orange on the map in front of us.

Q. Where does it go in the enacted plan?

A. In the enacted plan, District 79 leaves the portions that it had in Suffolk and in Chesapeake and

it goes -- it retains most of its population in Portsmouth and it takes more population in Norfolk, specifically around the naval base in Norfolk.

Q. And that is the direction where there's the population to spare?

A. Yes.

Q. So that's why it moves in that direction?

A. Yes.

Q. Are there political -- did you have political concerns in that process?

A. Yes.

Q. What were they?

A. In District 79, Delegate Johnny Joannou was one of [646] the members that Chris Jones received input from, and Delegate Johnny Joannou, who's --

MR. HAMILTON: Objection, Your Honor. This is hearsay. We had this problem when Delegate Jones was testifying, and as I recall, Your Honor sustained the objection from Delegate Jones testifying about his conversation with Johnny Joannou.

If Delegate Jones passed on that information to Mr. Morgan, it's hearsay. If Mr. Morgan received it from Mr. Joannou, it's hearsay. For the same reason, I object.

Q. The question that I asked was did you have political considerations in this process?

A. Yes, I did.

JUDGE PAYNE: The answer is yes. And then the question is what were they?

MR. RAILE: And that's what I asked.

JUDGE PAYNE: He's not asking the question yet, Mr. Hamilton. You wait and see what happens. Wait and see what happens. You can always move to strike it. Let's get on.

MR. HAMILTON: I will, Your Honor.

JUDGE PAYNE: Let's get the question on the table now.

MR. HAMILTON: I didn't object to the question. I objected to the answer. About halfway through, he [647] started a sentence saying Johnny Joannou -- and I suspect what he was going to answer so --

JUDGE PAYNE: But he didn't answer what Johnny Joannou said. So we stopped it. Now, get your question out. He had concerns, Mr. Morgan did.

BY MR. RAILE:

Q. Were what were those concerns?

A. I had concerns that taking -- taking population away from Johnny Joannou in Portsmouth and putting population in Norfolk would change the balance of his district. The core of his district and his political base, as I understand it, was in Portsmouth. I worked in this redistricting process in 2001. I've looked at election results in that area, and I understood that Delegate Joannou's base was in Portsmouth.

So in drawing this plan, I took the naval base population into District 79, which has a lot of population. It has, in fact, 25,000 people, or more, in a single voting district. But the votes in that district are not at the same -- the same numbers as the population. So essentially, there are a lot of population and fewer

voters. So there's fewer voters added in rounding out his district.

And that was a consideration that I considered in drawing the naval base into Delegate Joannou's district as [648] opposed to just any a population in Norfolk.

Q. So this population in the naval base area helps Johnny Joannou politically in your view?

A. Yes.

Q. And that comes over from House District 100?

A. Yes. District 100, in the benchmark plan, had the bulk of the naval base population. And in the enacted plan, the naval base population is put into District 79, Johnny Joannou's district.

Q. 100 still has to cross, doesn't it?

JUDGE PAYNE: Has to what?

MR. RAILE: To cross the Chesapeake.

Q. There's not enough people, right.

A. That's correct. So the people to round out District 100 were taken from the center of District 87. So if you look at District 87 in the former boundaries, the central section was placed in District 100 and the eastern section was placed in District 83. And that's how the population of old 87 was divided.

Q. Can you point to the -- where 100 is in South Hampton Roads in the enacted plan?

A. In the enacted plan on the screen, the central section here is paired with the Eastern Shore counties of Accomack and North Hampton.

Q. Okay. What happens to --

[649] JUDGE PAYNE: Excuse me. On that page it's the beige section is what's paired with the Northern Neck?

THE WITNESS: It's --

JUDGE PAYNE: I mean the Eastern Shore?

THE WITNESS: Yes, Your Honor.

Q. What happens to House District 80?

A. House District 80 takes the western most portions of the benchmark District 79. So as the -- as District 79 moves to the naval base population, the western portions of District 79 were assigned to District 80. The outer bounds of Districts -- old District 79 and new District 80 in Suffolk County and in Chesapeake are the same.

Q. Can you point on the map, both the benchmark and the enacted, to show what you mean by that? A The purple district in this map is House District 76, and these are the portions of the western portion of District 79, which is in orange. Those were transferred to District 80.

Q. Why don't they go to 76?

A. My understanding is that Delegate Jones did not want to put those precincts in his district, and he's following the same line that was established in the benchmark plan for his district.

Q. You could have -- could you have given this -- I guess we'll call it a tail. Could you have given it to [650] another district other than 76 or 80?

A. It could have gone to another district on the peninsula perhaps.

Q. So it could have crossed the river?

A. I suppose this tail could have been given to District 95.

Q. You could have done a river crossing here?

A. Yes.

Q. Why didn't you do that?

A. My understanding was that that was not to be done in drafting this plan; that there would not be crossings of the James River tidal estuary.

Q. James River tidal estuary. Now, there are river crossings in South Hampton Roads elsewhere, aren't there?

A. Yes.

Q. What's the difference?

A. It was something that was challenged in litigation in 2001 and 2003 after the 2001 plan, and Delegate Jones expressed to me not to cross the James River in that way again.

Q. And I thought I heard you say a minute ago the estuary. What is that?

A. That's the tidal portions of the river.

Q. What's the diff.erence between a estuary and the rivers down here?

[651] A. Basically, it would be the size of the crossing, generally.

Q. This is bigger than those?

A. Yes.

Q. Okay. So that's your understanding of the factors that drove that decision; is that right?

A. Yes. It was not going to happen.

Q. Okay. Take -- did you ever propose a plan that did that?

A. Yes.

Q. What happened?

A. It wasn't considered.

Q. Okay. Let's take a closer look at House District 80 on Defendant-Intervenors' Exhibit 94, page 10. All right. So we already talked about this -- these precincts, Yeates. Taylor Road, Harbor View 38, 34, right?

A. Yes.

Q. Why was this portion put in House District 80?

A. Well, as I described, the population of the Norfolk Naval Base was put into District 79, and District 79 transferred the population in that area to District 80.

Q. Now, the precincts 29, 28, 26, 27, 31, 19, 18, 17, 16, 14, 5, 21, 20, 13, that area. Why are those in there?

A. Those were retained in District 80. They were in the benchmark district plan.

[652] Q. Just keeping them where they were?

A. Yes.

Q. Do you recall why the Johnson Park and Berkley precincts were taken out?

A. Yes.

Q. And what's your recollection?

A. Johnson Park was given to Delegate Spruill. It was my understanding that he wanted that area of the district in Chesapeake, that area of Chesapeake added

to his district. And the Berkley voting district was added to District 89.

Q. Old Dominion, Taylor Elementary School, why did those come out?

A. In this sense, the voting districts in this area reduced the footprint of District 80 and also Berkley. By moving those, there's less of a footprint of District 80 in Norfolk.

Q. Now, Chrysler Museum stays in, doesn't it?

A. Yes.

Q. Do you recall why?

A. In my opinion, it has to do with the base population and the Norfolk voting population. Essentially, as I described, adding more strongly voting population to Delegate Joannou was not something that was desired.

Q. Now, we talked about these precincts on the west. [653] Did you read the report of Dr. Rodden in this case?

A. Yes.

Q. Do you recall where he wrote that Delegate Joannou couldn't have been happy about that?

A. Yes.

Q. What's your response?

A. I don't agree with that.

Q. Why not?

A. Because my experience with Delegate Joannou and the election results in this process inform me that Delegate Joannou would like his base in Portsmouth and not too much in Norfolk.

MR. HAMILTON: Objection. Your Honor, this is speculation. He has no foundation to be testifying about what Joannou wanted or didn't want other than -- it's either speculating or it's based on hearsay.

MR. RAILE: Well, I would offer it as impeachment of Dr. Rodden, who said, in his report, that Delegate Joannou couldn't have been happy by that.

MR. HAMILTON: It's not an exception to the hearsay rule, Your Honor.

JUDGE PAYNE: Well, why is it hearsay?

MR. HAMILTON: Because he doesn't have a foundation to testify to what Delegate Joannou --

JUDGE PAYNE: He said it came from Joannou, [654] right, and it informed why he did what he did. He said that Joannou told him something and Joannou -- maybe I misunderstood. Ask the question again. I don't -- I don't think where he got was hearsay, but I'm --

Q. What's your response to Dr. Rodden's claim that Delegate Joannou couldn't have been happy with this?

A. I disagree with that.

Q. Why?

MR. HAMILTON: That question calls for speculation, Your Honor.

JUDGE PAYNE: Well, that one does unless he establishes the reason for it. He can establish a foundation with his question. Why, because of X. You got one, a question?

Q. You were involved in the 2011 redistricting, correct?

A. Yes.

Q. And you were there drawing maps on a daily basis in the House of Delegates?

A. Yes.

Q. And you were talking with Chris Jones at the time, correct?

A. Yes.

Q. You were talking with other delegates at the time; is that correct?

A. Yes.

[655] Q. Talking with other consultants?

A. Yes.

Q. Such as Chris Marston?

A. Yes.

Q. And were you hired to provide political advice?

A. Yes.

Q. And that's because you have experience in elections in Virginia in this region and other regions, correct?

A. Yes. I have spent --

Q In fact, you helped Delegate Jones in his election in this district, correct?

A. I helped Delegate Jones in his district. I've had thousands of hours of experience working with election data and elections and census data in the Commonwealth.

Q. Do you have an understanding of why this change moving this out of Delegate Johnny Joannou's district would benefit Delegate Joannou?

A. Yes.

Q. What is that understanding?

A. My understanding is that Delegate Joannou's core was Portsmouth. That was his political base. And pairing his district with some portions of Norfolk was going to happen, and the portions of Norfolk that were paired were primarily in the naval base and they had fewer voters that would be less of a difficulty for him to contend with in a [656] potential primary.

Q. So you believed, based on what we just said, that this was beneficial to Delegate Joannou, correct?

A. Yes.

Q. And that is the basis on which you disagree with Dr. Rodden, correct?

A. Yes.

Q. Okay. What happened to Delegate Johnny Joannou?

A. I believe that Delegate Johnny Joannou was reelected in 2011, and then he subsequently lost in a primary. And I believe his opponent was from Norfolk.

Q. Best laid plans of mice and men. Is that this?

A. He lost in the primary.

Q. You did your best, and that didn't work?

A. He was a conservative democrat, and he lost to a less conservative democrat in the primary.

Q. Did you read in Dr. Rodden's report where he says that House District 80 is the lynchpin of the redesign of the South Hampton Roads region?

A. I read that, yes.

Q. What's your response to that?

A. I disagree with that.

Q. Why?

A. Because in my experience in drafting the plan, taking Delegate Joannou's concerns were an important factor at [657] driving the redistricting process, in combination with the population changes in Norfolk that we previously discussed regarding District 87.

Q. Let's move on. House District 77. Defendant-Intervenors' page -- is Exhibit 94, page 8. Mr. Morgan, what do you know about why this district is configured the way it is?

A. District 77 was Delegate Lionell Spruill. He's somebody that I had worked with in 2001 and in 2011. He's somebody that was, in my opinion, close to Delegate Jones. And Delegate Spruill wished to have these precincts over an the eastern portion of his -- of the district of Chesapeake added to his district, including Johnson Park, and he wanted that portion of Chesapeake in his district.

Q. Can you point to where that is on the map?

JUDGE PAYNE: That is Oaklette, Norfolk Highland and Indian River?

THE WITNESS: Yes, Your Honor. And Tanglewood.

JUDGE PAYNE: And Tanglewood, yeah.

Q. So what about -- I can read them all off. John F. Kennedy. I believe it says White Marsh, Sunray, Camelot. All of these districts -- precincts VTDs that were kept in, do you know why those were kept in?

A. They were in his existing district.

Q. Is it fair to say that this district retains its [658] core?

A. Yes, it retains its core.

Q. How long has it looked like this?

A. It looked like this in 1991 and in 2001.

Q. How long did Delegate Spruill represent this district?

A. Since 1993. He was first elected in 1993.

Q. Soon after, it assumed the bulk of its current configuration; is that correct?

A. Yes.

Q. Okay. The Airport VTD drops off of the western end. Why does it do that?

A. The Airport VTD is put into Delegate Jones' district. It is a republican voting district. And more to the point, it's required for contiguity to connect the southern portion of Delegate Jones' district, which is what I'm outlining here, through Deep Creek, to the northern part of his district here. Without that, his district would not be contiguous.

JUDGE PAYNE: Without what?

THE WITNESS: Without the Airport precinct in his district, his district would be cut in half.

Q. Let's look at that. Intervenors' Exhibit 96 and 97. It's the maps, the regional maps we have open here. Page 3. Delegate Jones represents House District 76, and [659] that's this purple district in the benchmark plan that I'm highlighting in the regional map; is that right?

A. That's correct.

Q. What happens to his district in the redistricting?

A. In his district, he retains most of his population in the northern part of the district, including the western branch of the city of Chesapeake. He retains most of the portion in this southern portion of the district. But in this context, as I understand what we're discussing is this section here that I've drawn a triangle around, in the southwest of his district, three voting districts -- which are now four, actually -- were transferred to District 64.

Q. So do you recall if Delegate Jones' district was overpopulated or underpopulated coming into the redistricting?

A. His district was overpopulated.

Q. So it has to shed territory, right?

A. Yes.

Q. And it sheds it to District 64; is that right?

A. And also -- District 64, yes. And also District 77.

Q. So show us the Airport precinct in the enacted plan.

A. The Airport precinct is right here.

Q. So if that doesn't come out of Delegate Spruill's district, you have a piece here and a piece here and [660] nothing to join them; is that right?

A. That's correct. It would not be contiguous.

Q. So if you're not looking at this on a regional level, you don't have any way to understand why that move occurs; is that right?

A. That's right.

Q. Let's move on to House District 90. Intervenors' Exhibit 94, page 12. What do you know about why this district is configured the way that it is?

A. District 90, in the benchmark plan, was comprised of population from the city of Chesapeake, city of Norfolk and the city of Virginia Beach. And in redrawing to the enacted plan, the portions of Chesapeake were moved from 90 to Delegate Spruill's district, 77. And so District 90 needed to gain additional population, and it was done by getting more population in Norfolk on the north and in Virginia Beach on the east and the south.

Q. So Sherry Park and College Park and part of Reon were added; is that correct?

A. Yes, as well as on the north side Shell, portions of shell, Davis Corner and portions of Aragona.

Q. Do you recall why those changes were made?

A. Well, as I mentioned, the area of Chesapeake was removed, and District 90 was already in Virginia Beach. So additional population was taken from Virginia Beach. [661] And what I would say is that the areas that were taken from District 85, which are Sherry Park, College Park, Reon and Davis Corner are democratic precincts, and it affected the political makeup of District 85, which is an adjacent district. By taking those democratic precincts out, it affected District 85.

And what District 85 did is District 85 actually took democratic performing precincts away from District 21, which is all the way over here in the center of Virginia Beach. That district is represented by

Delegate Run Villanueva, District 21. He was first elected in 2009 in a swing district.

So some of the democratic precincts on the north end of his district were transferred to District 85 to help Delegate Villanueva improve his republican performance in his district. So at the same time, basically District 85 is taking some democratic precincts there on the north end of old 21 and some democratic precincts are removed from District 85, put into District 90.

Q. So there's --

JUDGE PAYNE: Villanueva is a republican?

THE WITNESS: Yes, Your Honor. He's a republican. He's also Filipino.

Q. So you have political concerns two districts away that are affecting this district, right?

[662] A. Yes.

Q. You'd have to understand those concerns to understand the factors that went into the design of this district?

A. Yes.

Q. Do you recall why Barron Black comes out?

A. Yes.

Q. What's your recollection?

A. I've done political work in this area before. Barron Black is a republican leaning precinct. It was added to the new district for Delegate Stolle. His district, which was previously entirely in Virginia Beach, as we discussed earlier, absorbed the portions of District 87. So he was getting some new territory,

and this was a republican leaning precinct for Delegate Stolle's new district.

Q. Tanners Creek, Sherwood School. Does that say Coleman Place School?

A. Yes.

Q. And those are added, right?

A. They are added from District 89.

Q. Do you know why?

A. I don't recall.

Q. It was a while ago, wasn't it?

A. Yes.

Q. There are some split VTDs in this district, correct?

A. Yes.

[663] Q. Where?

JUDGE PAYNE: Would this be a good place, since you're changing to VTDs now, to take the morning recess of 20 minutes?

MR. RAILE: Absolutely, Your Honor. I'd love a break.

JUDGE PAYNE: All right. We'll take 20 minutes.

(Recess taken.)

[664] JUDGE PAYNE: All right, Mr. Raile.

MR. RAILE: Thank you, Your Honor.

Q. Mr. Morgan, we left off on the scintillating topic of VTD splits in House District 90. There are a few different splits; is that correct?

A. In House District 90, there are, I believe, there are four splits.

Q. Where are they?

A. There's a split of the Shell VTD here which is split between 83 and 90. There is a split over here in Brambleton voting district which is split between 90 and 89. There is a split between 90 and 85 in Aragona precinct, and there's also a split between 85 and 90 in the Reon precinct.

Q. The split between HD 90 and 83 is the only VTD split between those two districts; correct?

A. Yes.

Q. And why was that done?

A. That was done to equalize the population between District 83 and District 90.

Q. Is it typical that when you would be splitting a VTD for equal population purposes, you would have one split on the border of the two adjacent districts, just one; is that correct?

A. That is the general practice, yes.

Q. But -- and that's the case here in 83; right?

[665] A. One split between 83 and 90.

Q. And that's the case on this western border; right?

A. Yes. There's one split between 89 and 90 in the Brambleton voting district.

Q. It's not the case as to HD 90 and HD 85, though, is it?

A. That's correct.

Q. What happened there?

JUDGE PAYNE: Which ones?

MR. RAILE: HD 90 and 85.

JUDGE PAYNE: Aragona and Reon.

THE WITNESS: That's correct, Your Honor.

Q. So there's two?

A. Yes, there are two.

Q. What happened there?

A. There were two splits. The original plan, as it came out, and, I believe, either it came out to the subcommittee, the original bill that Delegate Jones had, or the vetoed bill did not have Reon split. There was one split over here in Aragona.

So there was only one split between 85 and 90, and that split -- again, I'll just line it right here -- is along Witchduck Road which is a recognizable major thoroughfare in Virginia Beach.

The other split that I'm talking about here in Reon came later in the process, and that was -- it was basically already set, the boundary of the split, between 90 and 85 in Aragona, [666] but what happened was District 90 ended up having too much population after changes were made between the vetoed bill or the subcommittee bill and the enacted plan.

So what happened was that District 90 was overpopulation, so it had to shed some population into District 85 to further equalize its population. So that was where that split was made. It was the last split in this district.

Q. Why didn't you go back to Aragona and rectify population over there?

A. At this point, it just was simpler at the time to just finish with Reon. That was one of the VTDs, the

voting districts, that was added into District 90, so that was the area that was taken out.

Q. Were you happy with the line in Aragona on Witchduck Road?

A. Yes. It was an established understandable boundary.

JUDGE PAYNE: Why did you make the split changes in Brambleton/Aragona?

THE WITNESS: Yes, Your Honor. Brambleton was split between 89 and 90 in the vetoed plan or the subcommittee plan. There were three bills that we talk about in this process plus the benchmark plan. There was a bill that initially Chris Jones had, and then he received a lot of input before it became the House Bill 5001 which was vetoed, and then it moved to 5005 which was the enacted plan.

In that process, Brambleton was already split, and [667] the boundary of that split was changed between the subcommittee bill that was marked up and the enacted plan. There was a change in there, and I believe -- and also with the Union Chapel. The movement of Union Chapel occurred during that process from the subcommittee bill to the enacted plan, and that changed the split in Brambleton. It meant that District 90 and 89 line split and Brambleton changed a little bit.

JUDGE PAYNE: For population reasons or something else?

THE WITNESS: Yes, Your Honor, the population was rectified between 89 and 90.

JUDGE PAYNE: What about 90 and 85?

THE WITNESS: Because of the changes between 89 and 90, it threw District 90 out of population alignment. So it was rectified in Reon.

Q. So splits occurred at two different phases of the process?

A. Yes. The Reon split was the last split made chronologically in this process.

Q. And so -- and you've testified that there's three different phases that we're concerned about; there's the -- is it the Conference plan that you said?

A. On the Department of Legislative Services publicly available website, they referred to that as the subcommittee bill, as C. Jones subcommittee bill. That's what I understand [668] it to be. That would be the first working plan that Delegate Jones had, you know, for work with the members on the subcommittee in the process, and then that later became HB 5001 that we've discussed in this process which was vetoed.

Q. And those are publicly available on the Division of Legislative Services website; correct?

A. Yes, and they have all of the information there on those plans.

Q. So those would be available to, say, an expert in this case?

A. Yes.

Q. When you split the Reon VTD or the Aragona VTD, did you use a racial thematic on Maptitude to provide racial thematics for the census blocks, at the census-block level where you're drawing and doing those splits?

A. No.

Q. Did you use that theme for splitting VTDs and drawing at the census-block level when you were drawing any of the challenged districts?

A. No.

Q. Let's move on to House District 89, the last one in South Hampton Roads. Mr. Morgan, what do you know about why this district is configured in the way that it is?

A. Well, we discussed some of the other districts in this process that are adjacent to District 89, and, as such, they [669] have an impact on District 89. The portions of Norfolk on the west side were added to District 89, and they are primarily coming from District 79.

So this section up here, Larchmont Library, Larchmont Recreation Center, Tucker House, portions of Zion Grace were added to District 89 primarily from District 79 and maybe from 100. I'm not sure in this view of the district.

And then, as discussed earlier, Berkley was added to the southern portion of the district. This is a portion -- even though it's south of the river, it is a portion of the City of Norfolk. And then we also talked about Union Chapel and Brambleton. So this illustrates the Brambleton split of the VTD a little better than the previous map. That's basically Brambleton, and then Union Chapel was also split.

Q. Let me stop you right there. Do you recall why those splits were made?

A. The Brambleton split, we had already discussed that.

Q. Correct, and the other one?

A. There's another split in this district on the north end, the Granby precinct, and that was split between District 100 and District 89. It had previously been split in the benchmark plan, and you can see this on this screen, the pink line here is the outline of the benchmark plan. So District 89 came up to this pink line here, and then this was the boundary that was not in District 89.

[670] Q. Do you recall why that split is shaped the way it is?

A. Yes.

Q. What's your recollection?

A. Well, if you consider District 100 here, District 100, which we discussed before, has the population from the Eastern Shore, and it has, as such, no split VTDs anywhere on the Eastern Shore. It's entirely the counties of Accomack and North Hampton, and then it comes into the city of Norfolk to get the balance of its population.

So District 100 took Suburban Park as a whole voting district, and it didn't have the right amount of population. So the VTD which had already been split, Granby, was split additionally.

Q. Right. And my question is, do you recall the shape of the split, why its shaped in this fashion that it's configured in?

A. Yes.

Q. What's your recollection?

A. When you look at the census-block geography, which is not on this map, when the splitting occurred,

there's a census block that is on the eastern border that was taken first, and the next census block is like a hat, all the way across the remainder of that section. It has about 200 people in it, and then I basically took in the additional census blocks below that hat to even it out to that outer boundary.

Q. Why didn't you go further down?

[671] A. That's all that was needed.

JUDGE PAYNE: To get a population equality.

THE WITNESS: Yes.

Q. Once you get the even population, you stop?

A. In most cases. Again, I was evening it out, and the top census block follows the entire boundary of that portion that was in Granby, and that one block is entirely the northern border of the district. And so when I filled in the remaining blocks down below to square it off.

Q. Do you recall at what phase of the process that occurred?

A. That was in one of the last phases. There were -- and I think I can illustrate this here. I mentioned Union Chapel was added, one of the last pieces that was exchanged between 89 and 90, and, actually, a portion of Bolling Park was -- there was a voting district split that was rectified between the subcommittee or vetoed bill and the final bill, and that was a split that was taken out in the Bolling Park area, and then I mentioned we changed the Brambleton split which was already split. So that was one of the last things, and then equalizing between 189. There was a different configuration in the

subcommittee bill to the north of this district between 79 and 100.

Q. All right. Let's cross the estuary and go into North Hampton Roads. To do that, let's look at the regional map, Defendant-Intervenors' Exhibit 96 at pages two and three. [672] Again, that's in map book one, I believe.

JUDGE PAYNE: What page are you on? 96, 97 --

MR. RAILE: Your Honor, I'm in Exhibit 96 and 97, on page two of each. And, again, in map book one, they are sort of consolidated so that you have before and after right here.

Q. Mr. Morgan, what -- in you are understanding, what were the pressures brought to bear on the redistricting on North Hampton Roads in 2011?

A. Well, this area would commonly be referred to as the peninsula, and it's bounded between the James River on the south and the York River on the north. And when looking at the benchmark plan, most of these districts were very underpopulated.

District 91, which is here, was about 20 percent underpopulated. District 92, 95 were in the mid teens underpopulated. District 93 was underpopulated. District 94 was underpopulated.

So District 91, 92, 95, 94, and 93, five of those adjacent districts were underpopulated. In the aggregate, it was about half of a seat or 40,000 people under what was needed for keeping those districts whole.

Q. Let me stop you right there. Why didn't you collapse a district here and move it somewhere else?

A. Okay. Looking at the benchmark districts, you'll see that the orange district here, District 64, crosses the James River [673] estuary at the ferry between Surrey and Jamestown. And this crossing was referred to previously as the ferrymander, and it was my understanding, from the start of this process, that that was not going to happen again.

As it ends up, this portion of district -- old District 64 is about one-third of a district. So what ended up happening was that there was about one-third of a district's worth of population that was going to be available, but it's up in James City County and the city of Williamsburg. And then basically you have just enough population to rectify those, but it's in a different part of the peninsula.

So what ends up happening is rather than collapse a seat, most of the districts have to be elongated towards that surplus population that became available.

Q. So the effect that we saw in HD 87 where you picked it up and moved it, a similar effect is being accomplished here by taking this and moving across the river; is that fair to say?

A. Well, in a sense, right. The portion of District 64 that was previously -- was in Williamsburg/James City County, once it was decided not to cross the river, that population becomes available to fix the population problems in the peninsula, and unlike District 87 where the district that was collapsed was at the edge of the -- like in Norfolk, it was at the edge, and then all the districts flowed towards the district that was collapsed.

[674] In this sense the districts are going to be flowing northward to get towards the surplus population in James City County and Williamsburg, and that's what happened.

Q. So the districts move up to take in that population; is that right?

A. Some districts move up to take in that surplus population, yeah.

Q. So describe to me what occurred.

A. Okay. In broad brush strokes at this point, again, District 91, 92, 95, 94, and 93 were all underpopulated, and so District 92, which is in the city of Hampton, remained entirely in the city of Hampton. It took voting districts from 95 and from 91.

District 91 took precincts from 96 and 92, and District 95 took precincts from 93 and 94. District 94 was close to population and took a little bit from District 93, and then District 93 is the district that took the entirety of old District 64. So it had a substantial impact on District 93 in the sense that at least one-third of 93 was new territory for the new District 93.

JUDGE PAYNE: It didn't take all of 64. It took the James City County/Williamsburg part of 64 north of the river; is that what you are saying?

THE WITNESS: Yes, Your Honor.

Q. Just the portion where the river crossing had been [675] eliminated; is that right?

A. Yes.

Q. Okay. What were the reasons that it evolved in the way that it did? Let me break it down. That's very

broad. I apologize. What was the motivation for the changes in House District 93?

A. District 93 was represented by a freshman delegate, Robin Abbott who was a Democratic member, and what ended up happening in this circumstance was her district was changed dramatically, and her residence was moved out of the district. She was paired with another incumbent. Her district was changed substantially and became less of a Democratic-leaning district and more of a swing district.

Q. Are you just describing that, or was that the goal?

A. That was the goal.

Q. Okay. So how does that work in the terms of the geography? What geographic changes accomplish that goal?

A. In this sense, the incumbent's residence was in the lower portion of District 93 which was assigned to District 94. A middle section was assigned to District 95, and a small portion was assigned to District 94.

The effect of that was to make the district more of a swing district, and, ultimately, what happened in the next election was Delegate Abbott moved her residence into the new District 93 boundaries, she ran for election, and she lost.

[676] Q. What is the role of House District 95 in accomplishing that goal?

A. House District 95 went up into some of the Democratic precincts in District 93, and they were transferred from 93 to 95, and that put the member in some jeopardy for her reelection by taking that

territory away from her in addition to adding new territory.

Q. Let's take a closer look at 94, because I think it will help us understand. Intervenors' Exhibit 94, page 14. Now, you could have drawn Delegate Abbott out of 93, and you could have stopped it there, couldn't you have, and accomplished the goal of drawing her out of House District 93?

A. Yes. She would have -- her residence would have been moved in the District 94 at that time, or District 95, if what I believe you are saying is the suggestion.

Q. Why does 95 keep going all the way up to the Reservoir precinct?

A. In my experience and working with these elections over the last decades, Reservoir, Epes, and Denbigh are strong Democratic precincts. They are basically 65 percent Democratic, 75 percent Democratic, and 30 to 35 percent Republican. And Reservoir and Epes were in District 93. So by taking those away from District 93, that makes it more of a swing district. So that's why those precincts, that's way District 95 goes up to that area, to take precincts out of 93.

[677] Q. If you stop at Palmer, you can't take Reservoir out of House District 93; is that right?

A. That's right.

Q. Now, to clarify my question, Reservoir, of course, is split; is that correct?

A. Yes, it's split.

Q. In fact, it's split in more than one way, isn't it?

A. It's split between District 93, 94, and 95.

Q. Okay. And so why did that happen?

A. There's less population in District 93 by splitting it in that way.

Q. Less population of what?

A. Of Reservoir voting district.

Q. There are multiple split precincts or VTDs between 94 and 95; isn't that right?

A. Yes.

Q. Didn't you just say that it's typical that you only have one split between two adjacent districts to equalize population?

A. Yes, that's usually the case.

Q. Is this an exception?

A. Yes, this is an exception.

Q. Why is this an exception?

A. Because in equalizing the population, District 93 took a lot of new territory, and what you'll find is unlike the other [678] districts in the area where the cores of the districts were preserved, District 93 had almost all of the change. You'll find that new District 93 retains only 50 percent of its original territory, and, in that sense, of all the districts in Hampton Roads, its core was the least preserved of any district in Hampton Roads.

So the political goal of changing that district and making it more of a swing district and pulling the Democratic territory out and population out of 93 that was previously in 93 is accomplished.

Q. If you make Jenkins whole in 95, do you have enough population to get all the way to Reservoir?

A. No.

Q. If you make -- how pronounce the D one?

A. Denbigh.

Q. If you make that whole, do you get all the way up to Reservoir?

A. No.

Q. If you make Epes whole, do you get all the way up to Reservoir?

A. I don't believe so.

Q. So you have to kind of thin it out to get it all the way up there; is that right?

A. Yes. And District 94 -- except for the addition of the lower portion of District 93, District 94 is relatively stable. [679] Again, the border is very similar to what it was in the benchmark plan except for the addition of the area around Robin Abbott's residence.

Q. I believe you testified that the voting in Reservoir is Democratic.

A. Yes.

Q. And when you are splitting this, is this an instance where political data below the census-block level matters?

A. Not really. I'm looking at taking as much as possible of Epes and Reservoir out of 93.

Q. So where do you -- how do you decide where to stop within the VTD?

A. In this case, it had a lot to do with District 94, and once District 94 was done, then that's all that it needed. I think that the political goal could be reached even more effectively if all of Epes and all of Reservoir were taken out. In fact, all of Epes is taken out of District 93, and most of Reservoir is taken out of District 93 in addition to precincts in the lower portion of 93.

Q. I believe you testified earlier that when you were drawing -- or, excuse me. When you were drawing at the census-block level, splitting the VTDs in the challenged districts, you were not looking at racial-themed census blocks on Maptitude; is that correct?

A. That's correct.

[680] Q. Is that the case here as well?

A. Yes.

Q. House District 95 gave some VTDs to House District 92; is that correct?

A. Yes. In looking at District 95 and the lower portion here, District 95 had portions of the city of Hampton, and those voting districts are with Mallory, Forrest, and Kraft, those were given to District 92 so that District 95 has less of a footprint in Hampton. In fact, District 95 is 80 percent in Newport News. Even with the additional -- addition of territory, all of the territory in the northern section is part of the city of Newport News.

Q. So why were these changes made?

A. These changes, these VTD voting districts were added to District 92, and that respects the boundary between the two cities in the sense that there's -- these

are not in District 95. There are still some voting districts that are from Hampton, Tucker-Capps, and Bethel, and one more that I can't read here. Sandy Bottom, I believe, yeah, there it is.

And so by making District 92 whole, District 95 needs to gain population, and it gained population as described by stretching north towards where the surplus was.

Q. Are you aware of -- strike that. You reviewed the report of Dr. Rodden; correct?

A. Yes.

[681] Q. And it was your understanding on reading his report that his belief is the configuration of both of these districts was primarily to achieve a racial target? Is that correct?

A. That's what his report says.

JUDGE PAYNE: What districts?

MR. RAILE: Both House District 95 and 92.

Q. Is that your understanding?

A. That's my understanding, yes.

Q. And that target is -- in his report, he says 55 percent black voting-age population; is that right?

A. That's what his report says, yes.

Q. Is that true?

A. Well, as I described here --

Q. Just answer yes or no; is that true?

A. No.

Q. How do you know that?

A. Because in drawing the districts, the changes were made as I described for political reasons relative to District 93, and, furthermore, the districts, when they were -- the majority-minority districts were similar to the benchmark districts in their black voting-age composition.

Q. Could you have drawn this in any number of ways and they would have ended up above 55 percent black voting-age population?

A. Yes.

[682] Q. How do you know that?

A. Because I've done that.

Q. Let's look at Intervenors' Exhibit 108, pages four, five, six, seven.

MR. HAMILTON: Objection, Your Honor.

JUDGE PAYNE: Do we have that exhibit in this little Morgan book, or is it somewhere else?

MR. RAILE: You have it in the Morgan witness binder, Your Honor.

JUDGE PAYNE: Exhibits what? 108, is that what we're on?

MR. HAMILTON: That's what we're on. The objection to this and Exhibit 111, which hasn't been identified yet but will be shortly, I think, neither of these documents were produced in the course of discovery. These were identified for the first time when the exhibit lists were produced.

They appear to be an effort to rebut Dr. Rodden, but Mr. Morgan is not an expert witness. Intervenors have identified no less than three expert witnesses, all whom will testify, none of whom prepared this map.

So it wasn't produced in discovery. It wasn't -- if it were expert material, then it should have been produced pursuant to Rule 26, but if it's not -- which, of course, that deadline was a long time ago. If it's not expert testimony, then it's a document that should have been identified in discovery, and it wasn't.

[683] MR. RAILE: Could I ask the witness a few questions to respond to Mr. Hamilton?

JUDGE PAYNE: First let me understand the objection. A, it wasn't produced in discovery?

MR. HAMILTON: Correct, at any time.

JUDGE PAYNE: But it was put on an the exhibit list.

MR. HAMILTON: About a week ago or two weeks ago.

JUDGE PAYNE: Whenever they were due, it was put on the exhibit list, and you objected to it then.

MR. HAMILTON: I did.

JUDGE PAYNE: And the objection you made was what?

MR. HAMILTON: The objection that we made at the time was either Rule 26(a)(2), undisclosed expert analysis, or Rule 37, failure to produce. In addition, we voiced an objection to relevance under 401 because the document wasn't produced at the time and it was never considered by him at the time, and 403 because it's simply -- by adding yet another undisclosed, unconsidered map, it introduces unnecessary confusion.

THE COURT: Why didn't you produce it during discovery?

MR. RAILE: It didn't exist.

JUDGE PAYNE: So what? I mean, that's not much of an answer.

MR. RAILE: The discovery obligations do not --
[684] JUDGE PAYNE: You have an obligation to supplement.

MR. RAILE: This was produced about as soon as it was created.

JUDGE PAYNE: You so supplemented. When you did that, did you say we are supplementing our response to interrogatory number such and such or request such and such, or what you did do?

MR. RAILE: I don't know the answer to that, Your Honor.

JUDGE PAYNE: You can't get very far without that answer as to his objection.

MR. RAILE: Ms. McKnight may be able to help. I don't recall what we said.

MS. McKNIGHT: Your Honor, we served them as part of our exhibits in the case when the exhibits were due.

JUDGE PAYNE: But not as a supplementary answer to any previous document request.

MS. McKNIGHT: We did not identify them specifically as a supplemental answer.

JUDGE PAYNE: So you didn't produce them in discovery. He's been surprised by it. Why should he be allowed to use it now? You are offering it as an exhibit, according to him, that was on the exhibit list. If you didn't produce this information in discovery, that's a threshold issue, isn't it?

[685] MR. RAILE: Sure. Well, if that's your understanding, Your Honor, I would respect permission to use it as a demonstrative.

MR. HAMILTON: Same objection, Your Honor. He's -- the witness has testified already, I think twice now, he can draw this district in a number of different ways under 55 percent. That's not actually in dispute between the parties. So maps showing that --

JUDGE PAYNE: He's the problem. What's your objection to using it as a demonstrative, I think? The fact that he's talked about something before is not much of a reason. What reason have you got for objecting to it as a demonstrative exhibit?

MR. HAMILTON: Your Honor, it's the same reason -- first of all, it was never identified as a demonstrative exhibit pursuant to the Court's order.

JUDGE PAYNE: It hasn't been; right?

MR. HAMILTON: It has not at any time.

JUDGE PAYNE: Was it ever identified as a demonstrative and handed over on the morning of trial or whatever it was you are supposed --

MR. RAILE: It handed over well in advance of that, Your Honor, I think.

MR. HAMILTON: As an exhibit.

JUDGE PAYNE: There's a difference. I don't think [686] you can use it. Anybody? I've given you every chance to say how you could get it in, but I don't see how you use it.

MR. RAILE: Thank you, Your Honor.

MR. HAMILTON: Thank you, Your Honor.

Q. You didn't go back and draw several different configurations of House District 95; correct?

A. I'm sorry, could you repeat the question, please.

Q. Sure. That was not a very well-worded question. House District 95 could be drawn in any number of ways and end up above 55 percent black voting-age population; correct?

A. Yes.

Q. And you actually tested that?

A. Yes.

Q. And you have four different versions of House District 95 that all were above that when you did that; is that right?

A. Yes, they were.

Q. The same mapping that you did in 2011?

A. Yes.

Q. Let's look at House District 92 which is Intervenors' Exhibit 94 at 13.

JUDGE PAYNE: At what?

MR. RAILE: Page 13, Your Honor.

JUDGE KEENAN: If you could please speak into the microphone. It's kind of hard to hear sometimes.

MR. RAILE: Thank you, Your Honor.

[687] Q. We already discussed the western boundary of this district; is that right?

A. Yes. We discussed the western boundary of District 92 was added to in Wythe, Mallory, and Forrest and Kraft were added to the district, and on the north end Sandy Bottom and Machen were moved.

Q. And are you familiar with -- you read Dr. Rodden's report; right?

A.. Yes.

Q You understand that he criticizes the decision not to include Bryan in House District 92?

A. Yes.

Q. And you understand the position in his report is that these decisions were made because of a goal of achieving black voting-age population of 55 percent black BVAP; is that right?

A. That's my understanding of what he said.

Q. Would adding that to House District 92 drop House District 92 below 55 percent BVAP?

A. Not in my experience.

Q. Did you test that?

A. Yes.

Q. After you read his report?

A. Yes.

Q. And you actually mapped it?

A. Yes.

[688] Q. And you found that adding Bryan to House District 92 doesn't take it --

MR. HAMILTON: Objection, Your Honor, at this point, he's been leading the witness all the way through. I've refrained from objecting, but at this point, he's just feeding --

JUDGE PAYNE: Why don't you let the witness testify.

MR. RAILE: Thank you, Your Honor.

Q. So did adding Bryan in that exercise you performed drop black voting-age population below 55 percent?

A. No.

Q. Let's turn to the Richmond area. Again, we'll look at the regional map, Intervenors' Exhibit 96 and 97, page four of both, both Exhibit 96 and 97. Again, that's map book one which folds open.

JUDGE PAYNE: What pages on these exhibits?

MR. RAILE: Page four, Your Honor.

JUDGE PAYNE: Page four on each?

MR. RAILE: Yes, Your Honor.

JUDGE PAYNE: Okay.

Q. Mr. Morgan, what is your understanding of the pressures that were brought to bear on this region in the 2011 redistricting?

A. Well, pardon me about this process, because I don't have the figures in front of me, but I think at this regional level, [689] there are some population considerations regarding the districts being over or under in the benchmark plan. So I'll refer to the benchmark, the 2001 plan here.

My understanding was that some of the Richmond area seats were underpopulated, and those were in the inner districts. 74 was not underpopulated, but I believe two of the others were, and then the key point at this level that I want to point out is that there was surplus population in Chesterfield County in District 27 and District 66, and, to some extent, I think District 62 had some surplus population.

And in this regional map, while I'm here because we may change views, there are also two districts in Henrico, 73, which is represented by Delegate O'Bannon, and 72, which is represented by Delegate Massie. So when we talk about the Richmond area, those are some of the districts that I may discuss during this process.

Q. So --

JUDGE PAYNE: 73 and 27 were overpopulated; is that what you are saying?

THE WITNESS: I wish I had the numbers in front of me.

Q. You can look at an exhibit with the numbers, Intervenors' Exhibit 134.

JUDGE PAYNE: Is that in his book?

MR. RAILE: Which is in his book at the end.

[690] JUDGE PAYNE: His book?

MR. RAILE: Yes, Your Honor.

JUDGE PAYNE: Look at the back of this black notebook, Mr. Morgan. It says Exhibit 134. Has numbers in it.

THE WITNESS: I see one map. Are there additional maps?

JUDGE PAYNE: It has percentages in it the best I have. It says map 33.

THE WITNESS: Northern Virginia is the one I see.

MR. RAILE: Look to the one that says map 32, which, I guess, is maybe Exhibit 133.

THE WITNESS: Thank you. I see it now.

JUDGE PAYNE: Is that Exhibit 133?

MR. RAILE: Yes, Your Honor.

Q. Does this refresh your recollection about the deviations in the Richmond region?

A. Yes.

Q. Okay. And so what is the trend that you see here?

A We see that districts -- the districts that are closer into Richmond, 73, 71, 69, and 68, are all underpopulated. So it's 11 percent in District 69; eight and a half percent in District 68; seven percent in District 73; and seven percent in District 71. So, you know, looking at all of them, they're about 30 percent under as a group of four districts. To the south, District 27 is overpopulated by ten percent. District [691] 66 is overpopulated by ten percent, and there's also a little bit of surplus population in District 72.

Q. So at the global level, what was the strategy for resolving these population discrepancies?

A. Well, in this sense, the surplus population from Chesterfield was ultimately brought into the Richmond area district. So primarily this was done by bringing the Chesterfield population into District 70, and that's kind of the regional view of how the population equalization was rectified in this region up as a whole.

Q. Why was it drawn into 70?

A. District 70 had already had a portion of Chesterfield County, and, again, the population growth, the available population, if you will, was in Chesterfield County. So by taking it from the

Chesterfield districts, it allows the districts to retain more of their core generally.

JUDGE PAYNE: I thought 70 had less than one percent -- was down less than one percent.

THE WITNESS: Yes, Your Honor. The benchmark district was within tolerance, but the group of districts in Richmond were below population. So the population from Chesterfield was brought into the Richmond area districts.

JUDGE PAYNE: It was put into 70, and all the others had to be adjusted because of that?

THE WITNESS: Effectively at this level, that [692] discussion, that's true, yes.

Q. You could have done the same thing with 69; right?

A. Yes.

Q. Why didn't they?

A. District 79, as I said, already had a portion of Chesterfield, and this was the district that absorbed the additional population.

Q. 70 was already in that county.

A. Yes.

Q. So the footprint was increased?

A. Yes.

Q. Let's begin -- well, let's stay at the regional level. What other strategies are there for resolving the population discrepancies at the more global level?

A. Well, this has been discussed before, but in the area of Hopewell, District 74, which includes -- in the benchmark plan included a portion of Prince George,

a portion of Hopewell, all of Charles City County, and Henrico, and possibly a small portion of Richmond in the benchmark plan, the estuary crossing of the James River was not continued into the enacted plan. So this portion of District 74 was removed from District 74, and, again, at the larger regional level, that's one of the things that was happening.

Q. So this section of the James River here is still considered the estuary, in your view?

[693] A. Yes.

Q. And we talked about the estuary a little bit further down the river before?

A. Yes.

Q. Okay. Let's turn to House District 74, Intervenors' Exhibit 94.

JUDGE PAYNE: You said something about 74 being Henrico, but only part of 74 is in Henrico, isn't it? I mean part of Henrico is in 74.

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: Henrico has other VTDs in it.

THE WITNESS: Yes, Your Honor.

Q. All right, House District 74, Intervenors' Exhibit 94 at page five. What do you know about why this district is configured in the way that it is?

A. As I mentioned, the portion of District 74 in Hopewell where it was crossing the James River, as we discussed, that was something that was not going to be continuing in the new districting structure.

That was removed from District 74, and then this portion of -- this is entirely a portion of Henrico County in the Chickahominy area right up to the county

border, that was added to District 74, and it essentially -- it thickens the neck is the term I've heard, and it basically rounds out the district up to the county line.

[694] Q. Is that why it was done?

A. Yes.

JUDGE PAYNE: What is why it was done? The question was, is that why it was done. What's the "it" in that sentence?

Q. You testified that thickening the neck is what occurred by adding these VTDs; is that right?

A. Yes. The VTDs were added --

Q. Let me stop you right there. What I'm asking you is, are you describing what happened, or are you telling me why those VTDs were added?

A. Those VTDs were added to bring the northern fragment of Henrico County into District 74 away from District 97 which was primarily a Hanover and New Kent district.

Q. Okay. What other changes -- would it be fair to say that this district retains its core from the past decade?

A. Yes. It retains the core of its district. It's principally a northern Henrico district, and, of course, it connects to Charles City County which is sparsely populated.

Q. We saw an exhibit yesterday where we saw that it went all if way back to 19991. Were you room in the room for that?

A. Yes, I saw that exhibit.

Q. Do you agree with the testimony of Delegate Jones on that, that that's the core retention since 1991?

A. I understand the district was largely the same from '91 to [695] 2001 to --

Q. And I want to go through that exhibit --

THE COURT: You are stepping on him now.

MR. RAILE: I apologize, Your Honor. I'm trying to save some time now.

Q. I'm not going to go through that exhibit again, but was it your understanding that one of the purposes for why this is configured the way it is is to retain that configuration?

A Yes.

Q. What changes are occurring on the southern border that kind of slants to the northwest in the district?

A. Laburnum precinct was added into District 74. Ratcliffe was removed from District 74. 301 in Richmond was added to District 74.

Q. Let me stop you there. Do you recall why any of those changes were made?

A. That had to do with exchanges between District 71 and 74 and 70 primarily.

Q. Do you remember the reasons for those?

A. I'd have to look in more detail at the districts. There's -- it was exchanging populations between the districts.

Q. And so keep going up the north border, Belmont, et cetera.

A. A portion of Belmont and Canterbury were removed from District 74. Hollybrook was added to District 74, and there was also some additional VTDs, portions of which were brought [696] into District 74 along that line.

Q. There's some split VTDs in that area; right?

A. Yes.

Q. Where are they?

A. The VTDs are split in Belmont, Moody, and one additional one. I don't have the map that shows that.

Q. Sure. Let's look at Plaintiff's Exhibit 69 at 33 which has a close-in.

A. The split VTDs, just to fully answer your question, are Belmont, Brookland, and Moody. These are the boundaries of the whole VTDs.

Q. Do you recall why those were split?

A. Yes.

Q. Why is that?

A. In building District 72, this precinct here, Canterbury was a strong Republican-performing precinct, and it was ultimately added to District 72, and District -- the Belmont voting district was split to allow Canterbury to go to District 72.

And the water boundary here is the boundary between District 74 and 72, and one of the things that occurred in drafting District 72 was, District 72 is shaped almost like an upside down U. I'm drawing the borders of District 72, and it has the mirror image of this configuration on the other side. So it's very much like a U-shaped district.

[697] So the border in that area was following the river boundary because it had a better impact on compactness for District 72 which was one of the least compact districts in the entire plan.

Q. Was it challenged in a recent court case?

A. Yes. District 72 was among the challenged districts in a state court case.

Q. Is that why you did that?

A. Yes. It was to put more physical territory into District 72.

Q. Did you discuss that with Delegate Jones?

A. There was discussion about the compactness of District 72.

Q. Do you recall discussing these specific VTD splits with Delegate Jones?

A. Not the specific splits, but there was discussion about District 72's compactness.

Q. Let's look at House District 71, Intervenors' Exhibit 94 at four. What do you know about why this district was configured as it is?

A. District 71 became more Richmond-centric by -- these portions of Henrico County were removed from the district so that the new District 71 has no portions of Henrico County in that area. And so Stratford Hall, Hilliard, and Summit Court were removed. As I also said in discussing 74 and 72, that allowed Canterbury to go into the new District 72 as well.

[698] And then there's been discussion about VTD 207. That was moved from District 71 to District 68, Delegate Loupassi's district. VTD 204 was brought into 71, and then on the other side of the district, 701,

702, and a portion of 703 were put in as well as 604 and then Ratcliffe which is also in Henrico County. And then District 301 was removed, and lastly, the split VTD between 69 and 70 is VTD 505.

Q. Do you recall why 301 was removed?

A. No, not specifically.

Q. Do you recall why Ratcliffe was added?

A. That was a population -- it was a large population VTD. It also did have African-American voting strength.

Q. Were you aware of concerns under this district under the Voting Rights Act?

A. Yes.

Q. What were those concerns?

A. My understanding is that District 71 in the benchmark plan no longer had a majority of African-American voting-age population. It was at 46 percent black voting-age population.

Q. Do you recall what it was at the beginning of the cycle in around 2001?

A. I believe it was 55 percent or above. I don't recall the specific number.

Q. So it had fallen quite a bit over the decade?

A. Yes.

[699] Q. Were there concerns that that would continue?

A. There were concerns that that would continue, and -- yeah.

Q. Were there any incumbency considerations in the crafting of this district?

A. Yes.

Q. What were those?

A. This is the City of Richmond, and as it happened, the incumbents live fairly close to each, and the incumbents in neighboring districts lived pretty close to each other. So basically Delegate Loupassi and Delegate Carr and McClellan live about three miles apart. Delegate O'Bannon is another three miles in that direction, and another three miles beyond that is Delegate Massie. So, generally speaking, these incumbents were close together.

Q. Are there split VTDs in this district?

A. Yes.

Q. Where are those?

A. There's a VTD split in 703 between District 70 and -- I'm sorry, District 71 in yellow and District 70, Delegate McQuinn's seat, and then there's a split VTD between District 69, Delegate Carr's seat, and District 70, Delegate McClellan's seat, and also a small portion of District 211, VTD 211 is also split, although that area involves no population.

Q. Did you discuss any of those -- strike that. Did Delegate Jones become involved in any of those VTD splits?

[700] A. Yes.

Q. Which one or more?

A. He was involved in the splitting in this region down here

on the border between 69 and 70.

Q. Why did he become involved in that?

A. My understanding was that he received feedback from the Richmond registrar --

MR. HAMILTON: Objection, hearsay. He's repeating --

JUDGE PAYNE: Just asking him for a response.

MR. RAILE: Your Honor, I can withdraw that question.

Q. Delegate Jones became involved in that; right?

A. Delegate Jones was involved in that process, and it happened between the vetoed bill and the enacted plan.

JUDGE PAYNE: What VTD was that one that was split?

THE WITNESS: VTD 505 was split in a different manner in previous versions of these plans.

Q. Did you have an understanding of why it ended up split the way it was?

A. Yes.

Q. What was your understanding?

A. My understanding was that there was input from the City of Richmond registrar about splitting --

MR. HAMILTON: Same objection. He's repeating --

JUDGE PAYNE: Let's suppose for a moment that he is lying, that he got no input from the City of Richmond and that [701] he's just sitting here talking about it. What does that do to whether it's hearsay or not? In other words, he's offering it for why it is that he did what he did, not for whether or not the City of Richmond guy really said that or not.

Even if the City of Richmond guy did not say that and he's saying that's why I did it, you can later impeach him, but he can still explain why he did it without it being true whether the Richmond guy said it, can't he?

MR. HAMILTON: I don't think so.

JUDGE PAYNE: I guess we'll decide, I guess, but that's my understanding of the hearsay rule. Generally --

MR. HAMILTON: I think the truth of the matter asserted, we have to determine what is the matter asserted. The matter asserted is, I was at the Richmond registrar, provided input into the way this VTD was split. That's the matter asserted.

MR. RAILE: I think the matter asserted is I drew this line the way it was because that's what I was thinking at that time.

MR. HAMILTON: If that's what --

JUDGE PAYNE: That's what he was saying, I thought.

MR. RAILE: My understanding as well, Your Honor.

JUDGE PAYNE: I think that's what he asked. He drew the line for a reason. Why did you draw the line? Because he got some communication from the registrar directly or [702] indirectly. That's why he did it.

MR. RAILE: That's how I interpret it. The witness is right there. We can ask him.

JUDGE PAYNE: Ask him.

Q. Mr. Morgan, why did you draw the line the way it was drawn?

A. We -- Delegate Jones and I received input from the registrar of Richmond. There were many changes that were made between the vetoed bill and the enacted plan in the Richmond area. Those are all available publicly in looking at the 2011 redistricting, HB 5001 and HB 5005. Changes were made in Richmond. I was brought back in to assist Delegate Jones from the time that the plan was vetoed until the plan was enacted to make changes such as that.

Q. That was your motive for drawing it that way; right?

A. Yes.

Q. I see that 207 came out and went to Delegate Loupassi's district?

A. Yes.

Q. What was going on in your mind when you drew it that way?

A. This was additional Richmond area that was added to Delegate Loupassi's district. My understanding was that unlike the previous Republican delegate, Delegate Marrs, who was from Chesterfield, Delegate Loupassi is from Richmond.

Q. That's why you drew it in there?

[703] A. Yes.

Q. Let's move to House District 69. What do you know about why this district was configured the way that it was configured?

A. District 69 took in parts of the city of Richmond south of the James River, VTDs 402, 508, and a portion of -- I don't see it -- 609.

Q. And why were those changes made?

A. My understanding was that those VTDs were going to be added to bring District 69 up to the James River, and that was my understanding from the start of the process, that that was going to happen.

Q. That was the purpose, was to bring it up to the James?

A. Yes.

Q. What other changes were made that you are aware of?

A. District -- voting District 811 and 903 were added in the south, and then some Chesterfield VTDs were removed. That's Beaufont, Manchester, and Belmont, and, lastly, which we just discussed, VTD 505 was added, and at different times more of 505 was in, different configurations of 505 were in, but 505 was added.

Q. Is 505 the only split between House District 69 and House District 71?

A. Yes.

Q. And there is a VTD split on the western border; am I [704] correct?

A. I'm sorry, I don't understand.

Q. Are there any other VTDs split in this district?

A. Yes. VTD 410 is split. The Davis voting district is split. Also District 609, which goes all the way down here, is split.

Q. What's your understanding of why those VTDs are split as they are?

A. District 609, the split here along the I-95 interstate involves no population, and it essentially allows better contiguity for District 70, and the Davis split was done late in the process, between the time the bill was vetoed and the enacted plan.

There was a different configuration in the boundary between 69 and 27, and then, lastly, VTD 410 was also split in a different manner in the vetoed plan, and this split up to this line at the Chippenham Parkway was done in the last stages of the map-drawing.

JUDGE PAYNE: Why?

THE WITNESS: Your Honor, District 68, as I mentioned, is a portion of the city of Richmond and the county of Chesterfield. When that district was first designed in this configuration -- this goes back to 2001, but there was a previous incumbent, Panny Rhodes, who represented District 68, and in the redistricting process, more of Chesterfield was [705] added to her district, and she ultimately lost in the election. So the current configuration of 68 has Chesterfield and Richmond, and that is required for keeping those pieces together in a single district for contiguity.

Q. And to illustrate that, let's look at Intervenors' Exhibit 97 at page four. We can just pull it up on the screen. And you said the split is what makes House District 68 contiguous. Can you point to that on the screen?

A. Yes. VTD 410 -- could you erase that, please. I know it's generally where it is. Thank you. So the split

VTD is here, and between those two dots basically is the population of 68.

Q. Why not put the entire VTD in 68?

A. It had previously been in 68, and when it was adjusted, it was adjusted in that direction.

Q. Was that for population equalization reasons?

A. Yes. It's the only split between District 68 and 69.

Q. It's the same process that we saw illustrated and discussed ad nauseam earlier?

A. Yes, with the additional factor that I brought that split up to the Chippenham Parkway where previously, in the vetoed bill, it had been split in a different manner.

Q. And sometimes when you're splitting the VTDs, you are identifying some local landmark or road or something to make it a neat split?

[706] A. Yes.

Q. We saw that earlier in District 10.

A. Yes.

Q. House District 70, Intervenors' Exhibit 94, what do you know -- this is at page three. What do you know about why this district is configured in the way that it is?

A. Well, a lot of the district population is in Henrico and city of Richmond, but it's two different parts of the city of Richmond. It's the northern section up here where the incumbent, Delegate McQuinn, lives, and then a lot of her population for her district is in the southern part of Richmond and also in Chesterfield County.

And the portion -- again, we've used these maps. So the portion that's shaded was already in her existing district and remained in her existing district -- in the new district, I'm sorry.

Q. And this, as we talked about at the beginning, was where the population flow comes in from the overpopulated Chesterfield County; is that right?

A. Yes. The District 66 and 27 had surplus population, so, in a sense, by transferring that population, it allows those surrounding districts to retain more of their core, and it also solves the population requirements in the city of Richmond area districts.

Q. Were you in the room for Dr. Rodden's testimony?

[707] A. Yes.

Q. Do you recall when he testified that bringing these in in Chesterfield County was bringing in precincts that weren't similar to the other precincts in House District 70?

A. Yes.

Q. And do you have a response to that?

JUDGE PAYNE: Excuse me. "These" meaning Falling Creek, Meadowbrook, Southside, and Chippenham; is that what you are asking?

MR. RAILE: Yes, Your Honor.

THE COURT: We're going to read all this stuff, and we have to have something to identify. "These" doesn't help much.

MR. RAILE: Thank you, Your Honor.

Q. So Falling Creek, Meadowbrook, Southside, Chippenham, are they different and, from a communities-of-interest perspective, from the adjacent precincts?

A. Well, they're different jurisdictions except for Drewry's Bluff is in Chesterfield, but they're along the Chippenham Parkway, and that area is fairly similar in my understanding.

Q. Is this area of Henrico County, Sullivans, Mehfoud, Rolfe

-- did I pronounce that correctly?

A. I think it's Rolfe.

Q. Are those substantially different from these areas in Chesterfield County?

[708] A. They're not as -- they're more sparsely populated than that area of Chesterfield.

Q. Okay. Do you recall why Laburnum was dropped?

A. No.

JUDGE PAYNE: Are there split VTDs in here?

THE WITNESS: Yes. I believe there are in District 70. Your Honor, we previously discussed the split in 703. Up here is split between 71 and 70, and I believe the Dorey VTD is split between 62, Delegate Riley Ingram's district, and District 70, Delegate McQuinn's district.

So one split between 71 and 70, one split between 62 and 70, and then I don't believe there are additional splits. I'm sorry, we did discuss the split here between 69 and 70 that involves no population along the James River between 95 and the river.

Q. Are each of these -- it's just one split per adjoining district. Did I hear you correctly?

A. Yes.

Q. And is that just the typical equal population split?

A. Yes.

Q. Let's look at House District 63, Intervenors' Exhibit 94 at one. What do you know about why this district is configured as it is?

A. As we discussed earlier, the city of Hopewell portions that were in District 74 were available, and they were moved to [709] District 63, and portions of Hopewell and Prince George County were added here along -- in Prince George County, and if I may, at this point, I would like to describe District 63 as being --

MR. HAMILTON: Objection, Your Honor. He answered the question. I think it's time for another question.

JUDGE PAYNE: That's correct.

Q. So what is your understanding of why this eastern addition, including Rives, Courts Building, Hopewell precincts, Jefferson Park, what's your understanding of why it's configured in the way that it is?

A. Yes. To better understand that, I would characterize District 63 as being at the junction between Tidewater and Richmond. So in drawing this plan, this boundary changed a lot. There were many different versions of drawing District 63 that had different population configurations, particularly in Hopewell and Prince George County. This boundary

shifted a lot in drafting the plan, and I'm pointing this out because it sits at the junction between Tidewater and Richmond. To the south is District 64. To the north is District 62, and they met right here.

Q. And are there political concerns in the area that you were worried about when you draw this?

A. Yes. On this map, you can see that there are three incumbents visible on this map; Delegate Kirk Cox, who is from Colonial Heights; Delegate Riley Ingram in Hopewell; Delegate [710] Dance who was in the city of Petersburg. So those three incumbents, each one is in a different of the smaller cities in that area. So there were definitely concerns about their districts.

Q. Which one represents House District 62?

A. Delegate Riley Ingram represents House District 62. He was a Republican delegate.

Q. What was going on in House District 62 in the redistricting?

A. District 62 underwent a lot of changes, not quite as substantial the changes that were in District 93, but substantial changes to his district. In particular, he lost the balance of Prince George County which he had previously represented, and that is an area that supported him and was a Republican area that he had lost. So when his district was configured, he was going to be facing a lot of change in his district.

Q. And we can see that on Defendant-Intervenors' Exhibit 96 and 97. For the sake of time, I don't want to belabor the point, but -- well, you can see there the

change. What effect does that have on the adjacent District 63?

A. So the change -- basically the Hopewell area and the Prince George County area that was taken into District 63, again, District 63 sits between 64 and 62 at the junction between them.

[711] Q. And were you concerned about the border with House District 62 here?

A. Yes.

Q. What were those concerns?

A. Delegate Ingram was one of the last delegates on the Republican side to agree to the plan. And his district was undergoing a lot of changes, so those areas of Hopewell that he had not represented from 2001 to 2011 were in District 63, not in District 62. Those areas were heavily Democratic and would have affected his election. It's about ten percent of a district, those two wards.

JUDGE PAYNE: That's why Hopewell was put in 62 -- in 63 rather than 62?

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: Having concerns is one thing, but having concerns and what impact they have in the drawing is another.

MR. RAILE: I appreciate that, Your Honor. Thank you.

Q. This new section of House District 63, the Hopewell precincts that were brought into House District 63, were those in House District 62 in the benchmark plan?

A. They were not in House District 62. They were in House District 74.

Q. That would have been new territory for House District 62?

[712] A. Yes.

Q. Was that -- was the goal of avoiding putting that new territory in a district that already had new territory why that move was made as it was?

A. Yes. And as I described, Delegate Ingram was one of the last members to agree to vote for the plan, and late in the process he was somebody I remember having discussions with about how much his district had changed.

Q. Now, are you familiar with the statement of Dr. Rodden in his report that these Hopewell precincts had to be added to one of the Richmond area districts, whether 63 or a different district, in order to have all of them at 55 percent black voting-age population? Did you read that?

A. I read that portion of his report, yes.

Q. What is your response to that?

A. I disagree with that.

Q. What is your basis of that disagreement?

A. As I understand it, he was talking about districts being 55 percent voting-age black population, and having Hopewell in one of those districts is not necessary for that purpose.

Q. Did you map that out?

A. Yes.

Q. After you read his report?

A. After I read his report, yes.

Q. How long did it take you to do that?

[713] A. Ten minutes.

Q. This northern boundary here involving Church Road, White Oak -- I can't read this one. I can't pronounce it. You may be able to?

A. Matoaca.

Q. And the one that starts with an E there?

A. Ettrick.

Q. Why is that boundary there?

A. That's the same as the benchmark plan. District 63 had a portion of Chesterfield County, and that was retained.

Q. Why is the New Hope precinct in House District 63?

A. It was already in District 63, and in some proposed plans, it was removed from District 63 and assigned to District 75.

Q. Why was that proposal made?

A. District 75 needed additional population, and it took it from Dinwiddie County from District 63.

Q. And is that reflected in this territory that I'm drawing up here from Little Zion and these split precincts up into, I think what we've been calling in this litigation, the finger? Does that look like the right area?

A. That was ultimately what was done in HB 5005. That is the population that was moved from 63 to 75, yes.

Q. And how does New Hope, the concern about New Hope factor into that?

A. In the original draft, or one of the original drafts in [714] this area, New Hope was included entirely in District 75. Delegate Dance wanted to keep New Hope in her district, and I was aware of that. I was made very firmly aware of that.

Q. If you drew -- and so that proposal is rejected.

A. That proposal was rejected.

Q. So you end up with this configuration?

A. Yes.

Q. This border on the south with the jagged edge, do you know why that's drawn the way that it is?

A. Yes.

Q. Why is that?

A. It principally follows the 85 corridor here in the split, and this area was negotiated between Delegate Dance, Delegate Jones, and Delegate Tyler. Once that boundary was negotiated, it was not changed.

MR. RAILE: All right, Your Honors, I have no further questions.

JUDGE PAYNE: We'll take lunch in a minute, but if it's not too much, you are the one who split the VTDs for this plan, where they were split -- is that right? -- in the challenged districts? Is that right?

THE WITNESS: Your Honor, in most circumstances, yes, Your Honor.

JUDGE PAYNE: How, if at all, did you take race into account in splitting the VTDs in the challenged districts?

[715] THE WITNESS: I split them in the way that was described earlier. I really didn't take race into account in splitting the VTDs.

JUDGE PAYNE: You'll have a cross-examination after lunch. We'll take 45 minutes for lunch.

(Luncheon recess.)

[716] JUDGE PAYNE: Mr. Morgan, I remind you you're under the same oath which you took earlier in the day.

THE WITNESS: Yes, Your Honor.

MR. HAMILTON: May I proceed?

JUDGE PAYNE: Please.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q. Good afternoon, Mr. Morgan. You're not here today as an expert witness, correct?

A. That's correct.

Q. Only a fact?

A. Yes.

Q. And you know the difference, correct?

A. Yes.

Q. You were an actual expert witness in the *Page v. Virginia State Board of Elections* litigation, correct?

A. Yes.

Q. In that case you offered an opinion that race had not been the predominant factor in the drawing of Virginia's third congressional district?

A. Yes.

Q. You read the opinion from this Court?

A. I think so.

Q. Okay. And in that opinion the Court rejected your opinion and concluded that race, in fact, was the [717] predominant purpose in the drawing of the third congressional district, correct?

MR. RAILE: I object, Your Honor. I don't think --

JUDGE KEENAN: Is that relevant, Mr. Hamilton, to this inquiry?

MR. HAMILTON: I think it is, Your Honor. It's the same legislature doing the same redistricting at the same time.

MR. RAILE: Your Honor, I -- if I may.

JUDGE PAYNE: Since he's objected, I think you have a right.

MR. RAILE: Yeah. I -- the -- the question specifically that I'm objecting to is asking him about what a court found. That decision speaks for itself. I don't think it's Mr. Morgan's role to be telling us what a court did and did not find. We can interpret that decision, which I think is a legal question, what it means.

MR. HAMILTON: I'll withdraw the question, Your Honor.

JUDGE PAYNE: All right.

Q. All right. Mr. Morgan, you were paid for your testimony during your deposition in this case, weren't you?

[718] A. Yes.

Q. And you're being paid for your testimony today right here in this courtroom, correct?

A. I expect so.

Q. Altogether you've been paid, at least at the time of your deposition, more than $20,000 for your work in the Bethune-Hill case, correct?

A. In the previous time, yeah.

Q. I'm sorry?

A. In the previous time, yes.

Q. Okay. You haven't produced your invoices. We subpoenaed you for your invoices. They were -- they were not produced. Can you explain why?

MR. RAILE: Your Honor, I object. I don't see what that has to do with anything in the direct or why he's the right person to be telling about what discovery obligations were or were not complied with.

MR. HAMILTON: Why don't I rephrase the question.

MR. RAILE: And I would just add, I don't think this is the right forum to be litigating a discovery dispute.

JUDGE PAYNE: Are you going to withdraw that line of questioning?

MR. HAMILTON: I'm going to withdraw that [719] question.

JUDGE PAYNE: All right.

BY MR. HAMILTON:

Q. Since we don't have your invoices in front of us, can you tell us, since the date of your deposition, how much you've -- how much you've incurred that has not yet been paid or that has been paid since that time?

A. I don't have the answer to that off the top of my head.

Q. Okay. All right. During the time of the redistricting, I think it's clear from your testimony, you worked with Chris Jones in preparing the maps for the House of Delegates?

A. Yes.

Q. You were referred to as the fine carpenter who assisted the chief architect; is that right?

A. I heard that description, yes.

Q. You agree with that description?

A. It works, yes.

Q. And you've got an explanation for many of the districts that are at issue here that we just heard over the last three plus hours. We had a trial in 2015. You didn't testify during that trial, did you?

A. I was -- I did not testify, but I was available for testifying. I believe I was required to be there during [720] that process.

Q. No one called you?

A. Neither the plaintiffs, nor the defense called me, although I was under the understanding that it was possible that the plaintiffs might have called me. That was the last communication I had on that matter.

Q. You didn't testify in the trial?

A. I did not.

Q. Much less for three and a half hours?

A. That's correct.

Q. During your work in 2011 on this redistricting project for the House of Delegates, you used Maptitude software program, correct?

A. Yes.

Q. Each VTD or precinct in Virginia is made up at least one or, in many cases, several census blocks. I think you testified about that on direct; is that right?

A. Yes. That's right.

Q. And the census data released by the United States Census Bureau includes population and race data by census block, correct?

A. Yes.

Q. So let's talk about choices. You said the boundaries of these census blocks constrained your choices in drawing some of these district boundaries, correct?

[721]

A. I'm not sure I understand that.

Q. Well, let's see. You had a choice of which census blocks to add when you were splitting a VTD; isn't that true?

A. Yes.

Q. And you had a choice of which census blocks to exclude when you were splitting a VTD?

A. In some cases, it would have been impossible, particularly in regards to contiguity. You could select a census block and then there might be others that are interior to that census block.

Q. Sure. But in general, there are some census blocks you could include and are some census blocks you could exclude?

A. Generally, yes.

Q. Okay. And there were some census blocks, as you just said, that you had a choice to just leave where they were?

A. Yes.

Q. Those are all choices when you're splitting a voting tabulation district. You can make those choices within that voting tabulation district?

A .Yes.

Q. Now, election results are reported by the state of Virginia State Board of Elections or local election officials at the precinct or VTD level, correct?

[722] A. Generally that, is true.

Q. And generally, it's true that in the Commonwealth, election results data is not reported at the census block level, correct?

A. It's not reported at the census block level that I'm aware of.

Q. Below the level of the voting tabulation district, the VTD, you can't determine how any individual voter voted by looking at the official election results, correct?

A. I don't think there's any way to determine how any individual voter voted.

Q. So for any particular VTD for any particular election, we know how many votes were cast in the entire VTD for the republican candidate and for the democratic candidate and maybe for any third party

candidates that might be in the ballot for that election, correct?

A. Yes.

Q. But we won't know the number of votes cast -- won't know the number of votes cast at the census block level for any specific candidate, correct?

A. Not from the State Board of Elections.

Q. Right. Not from any official election result. You won't know the number of votes cast at the census block level?

[723] A. As I understand your question, no.

Q. And in some states, you can use political party registration information to try and understand the political composition of the VTD at the census block level, that's right, isn't it, in other states?

A. I -- I think so. I think even that would be different than -- than what you're describing.

Q. There's no political party registration information available in the state of Virginia, is there?

A. There's registration data available. There's no registration by party in the Commonwealth in Virginia.

Q. So the answer is that's correct; there's no political party registration available in the Commonwealth of Virginia?

A. That's my understanding.

Q. Now, you could try and examine partisan primary election participation to figure out the political composition of a VTD at a census block level, correct? That's an option?

A. I don't really understand your question. There's so many ways to do what I think you're trying to describe.

JUDGE PAYNE: He doesn't understand the question. Rephrase it.

MR. HAMILTON: I gathered that. I'll try again.

Q. You could -- there are partisan primary elections in [724] the Commonwealth of Virginia, correct?

A. Yes.

Q. And one way -- you could, theoretically, try and use the information about who participated in which partisan primary election to try and determine political composition of a VTD at a census block level? That's a possibility, isn't it? You described that to me in your deposition, didn't you?

JUDGE PAYNE: Wait a minute, now. That's about three questions that you're getting into it. I know you want the answer, but stay with them one at a time.

Q. Didn't you a describe for me in your deposition a technique of examining partisan primary election participation to try and determine the political composition of a VTD at a census block level?

A. Not simply at a census block level. Basically in Virginia, it is possible to find out who voted in a partisan primary election, where they lived. And it's easily possible in the same way that you would map an incumbent's residence, you could map the residence of a voter and it would be tied to a specific geographic location, their street address. And that kind of indication of an individual's residence, just like we

saw where a funeral home was or an incumbent's residence, it is possible to do that with individual voters. And in [725] this case that you're describing, I would know whether or not that voter participated in a democrat or republican primary for an individual voter to a specific address. That can be done.

Q. But so far as you know, that was not done in connection with your work on the 2011 House of Delegates districting, correct?

A. There was some data in that manner --

Q. Listen to my question. The question is as far as you know, that was not done in connection with your work on the 2011 House of Delegates district? Yes or no.

A. Some of that data was used.

Q. Who collected this data for you, sir, that -- the political date that you're discussing? Is that Clark Bensen?

A. The political data that I'm discussing was collected by Chris Marston. And to answer your question, it was available, but it wasn't really used in the map drawing process.

Q. Thank you. Now, when you do redistricting on Maptitude, you can turn off -- on or off filters that show different things, correct?

A. Yes.

Q. You can show counties or cities?

A. Yes.

[726] Q. You can show population?

A. These are slightly different points. What you were describing earlier I would describe as a layer, or

a boundary layer, and then the population is a data point.

Q. Okay. And you can also display racial data?

A. Yes.

Q. And we saw that in the illustrative exhibit that was displayed a little earlier during your direct examination; is that right? That left hand box, and when you were changing -- moving VTDs from one district to another --

A. Yes.

Q. -- that data would update, correct?

A. Yes.

Q. And that would show you the racial impact of moving a VTD from one district to another district?

A. Yes. All the figures are updated in the way that was described.

Q. Or one census block from one district to another district?

A. Yes.

Q. And in drawing these maps, you, in fact, considered race; isn't that true?

A. In drawing these maps, yes.

Q. It was not only available, but it was -- it was something that, in fact, was considered to ensure [727] compliance with the Voting Rights Act?

A. That was my understanding, yes.

Q. And it was used to achieve the 55 percent black voting age population racial target? You monitored that as you went through to make sure that each of these districts achieved 55 percent; isn't that true?

A. I would disagree with that.

Q. Was it an accident? Was it just a coincidence that they all hit 55 percent?

A. You asked about my experience. I answered your question.

JUDGE KEENAN: Excuse me. Mr. Morgan, I'm having a little trouble over here hearing.

JUDGE PAYNE: You might want to pull that mic a little closer to you.

THE WITNESS: Sure. Sorry.

JUDGE PAYNE: So you think you answered the question. Okay.

JUDGE KEENAN: Could you repeat the question, Mr. Hamilton, because I think I missed it.

MR. HAMILTON: Sure.

Q. The question was you monitored that racial data in Maptitude as you were building these maps in the 12 challenged districts to ensure that they achieved the 55 percent black voting age population, correct?

[728] A. No.

Q. And so my -- my question is you checked it at the end of the process to make sure they all hit 55 percent, didn't you?

A. No.

Q. Is it just an accident that they all reached 55 percent?

A. I drew the maps, and at different times in the process, people would evaluate the districts.

Q. And then suggest or recommend changes to ensure that the black voting age population reached 55 percent; isn't that true?

A. I don't know why they would make all these changes and suggestions.

Q. Okay. But whatever reason they might have had, the effect at the end in House Bill 5005 was that in each one of the 12 challenged districts, the black voting age population met or exceeded 55 percent, right?

A. According to the numbers from the DLS, Department of Legislative Services, that was true of House Bill 5005.

Q. So that's a yes?

A. I think there's a difference between what was on my map screen and the DLS numbers.

Q. One more topic, and then we'll talk about some of the specific districts here. Are you aware of a report [729] prepared years ago, more than a decade ago, by a Dr. Loewen in connection with a 2001 lawsuit entitled *Wilkins v. West*?

MR. RAILE: I object, Your Honor. I don't think this is within the scope of the direct examination.

JUDGE PAYNE: It may or may not. He's asking a foundation question to begin with. Let's see where we go, and it may or may not be pertinent. All right. So the question is are you aware of such a report, Mr. Morgan?

A. Yes.

JUDGE PAYNE: Go ahead. See what else you you've got, Mr. Hamilton.

BY MR. HAMILTON:

Q. You didn't read the report in 2001, did you?

A. It didn't exist in 2001.

Q. 2011. You didn't read the report in 2011?

A. I did not.

Q. Or at any time prior to 2011?

A. That's correct.

Q. The first time you've read this report was just in the last two years?

A.. That's correct.

Q Now, when you're drawing a district, it's sometimes necessary to split a VTD to equalize population I think I heard you say on direct; is that right?

[730] A. Yes.

Q. And when you do this, all other things being equal, you can choose any VTD that's on the border of the two districts you're trying to equalize, right?

A. Generally, I would agree with that.

Q. Because -- and the reason that's true is because population is fungible. It just doesn't -- if you're trying to just equalize population, as long as you've got a VTD that's between the two relevant districts, you can split any of them, assuming all other things being equal, like contiguity and so on, right?

A. Well, again, assuming contiguity, there are circumstances where that might cause a problem.

Q. If the goal is to balance population, the race of the population involved is irrelevant; isn't that true?

A. Yes.

Q. Now, Delegate Jones testified that when VTDs were split, as a general matter, he deferred to you on where to draw the particular lines that split those VTDs. Is that consistent with your recollection?

A. Yes.

Q. And you testified that there were -- I think you said around a hundred VTD splits across the state during the 2011 House of Delegates redistricting?

A. I testified that I didn't have that information in [731] front of me, and I speculated that it might be a little over a hundred.

Q. Little over a hundred?

A. I don't know what the number is as I sit here.

Q. I won't hold you to a particular number, but it's somewhere around one per district. Does that sound about right?

A. No. No, it does not.

Q. Okay. In the challenged districts, there were 39 VTD splits in the challenged districts, weren't there?

A. I'm not sure how you're counting splits, whether you're counting them as a split VTD or a division of a VTD.

Q. There were 39 splits of populated VTDs. That doesn't sound in the ballpark?

A. That sounds in the ballpark. I don't have the figure in front of me.

Q. Does it sound about right that there were about three times as many split VTDs in the challenged districts as in the nonchallenged districts?

A. I have no idea.

Q. Now, Mr. Braden said in his opening statement -- I think -- were you here for his opening statement?

A. Yes.

Q. Okay. He said virtually all of these VTD splits were [732] for population equality reasons. Now, I know in your direct examination there were a couple that you indicated other reasons for, but as a general rule, was Mr. Braden correct?

A. That's my understanding, yes.

Q. Let's take a look at a few districts. And I'm going to try not to replow the same ground we've been over three or four times now, but I want to ask you some very specific questions about why certain lines were drawn in certain ways. And I'm not asking you where they were drawn. I'm actually asking you why they were drawn that way. So let's start with District 71, if we might. This is the Richmond area?

A. Yes.

Q. And so I'm directing your attention to page 18 of Plaintiffs' Exhibit 69.

MR. HAMILTON: And for Your Honors, it's in the witness notebook provided by the intervenors. I've also put it up on the screen.

JUDGE PAYNE: As to Mr. Morgan?

MR. HAMILTON: I'm sorry?

JUDGE PAYNE: The Morgan witness notebook.

MR. HAMILTON: The Morgan witness notebook, right. It's Plaintiffs' Exhibit 69, and that's the Rodden report on page 18.

[733] BY MR. HAMILTON:

Q. This is the Richmond area, correct?

A. Yes.

Q. Do you have it there in front of you?

A. Yes.

Q. The incumbent was Jennifer McClellan?

A. Yes.

Q. And you knew she was reelected with large majorities routinely? You knew that, right?

A. I believe so.

Q. In configuring the district, one of the big -- one of the changes here was adding VTD 701, 702 and part of 703, correct?

A. Yes.

Q. And VTD 703 was split. I take it you're the person responsible for that split?

A Yes.

Q. And the reason that VTD was split was to equalize. population between District 70 and 71. Is that your testimony?

A. Yes.

Q. And if we look at the district as a whole, by dropping Summit Court, Hilliard and Stratford Hall and by adding 701, 702 and 703 and then VTDs Ratcliff, which is here, and 604, which is both on the eastern edge of the [734] district, the net effect of all that would be to drop white voters and add black voters, correct?

A. Yes.

Q. And Ratcliff is not part of Richmond, correct?

A. Correct.

Q. It goes into Henrico County?

A. Yes.

Q. So adding Ratcliff certainly doesn't make it any more Richmond-centric, right?

A. Compared to the benchmark district, this district is more Richmond-centric, in my opinion.

Q. Understood, but that's not the question I asked. The question I asked is adding VTD Ratcliff certainly didn't make it more Richmond-centric since it took the district -- or it added an appendage to the district that wasn't even in the City of Richmond; isn't that right?

A. Okay.

Q. Let's turn to House District 69, and this is Figure 6 on page 25 of the Rodden report. In reconfiguring House District 69, you took some of Chesterfield County out of House District 69, correct?

A. Yes.

Q. And I believe there were three areas that were removed, Belmont, Manchester and Beaufont; is that right?

A. Yes.

[735] Q. And the change was because it was short of population?

A. I'm sorry. I don't understand the question.

Q. Well, let me ask you, Belmont, Manchester and Beaufont were removed, correct?

A. Yes.

Q. And then two VTDs were added, VTD 903 and VTD 811. They are right here on the map, that sort of southern border of the district, correct?

A. Yes. In addition to other VTDs, yes.

Q. Okay. And those two VTDs are majority African-American areas, correct?

A. That's my belief, yes.

Q. Okay. And the areas that were removed in Chesterfield, they all have a higher percentage of white voters than VTDs 903 and 811, correct?

A. I think so.

Q. Okay. And you also split VTD 410; is that right?

A. Yes.

Q. Can you circle that on your screen in front of you? Do you see it? Thank you. Your eyesight is better than mine. That VTD was split to equalize population between Districts 68 and 69 and ensure contiguity between the two district; is that right?

[736] A. Yes.

Q. And the split just happened to divide the portion of VTD 410 into a majority black portion to the south and a majority white portion to the north?

A. No. It was decided along Chippenham Parkway.

Q. Let's look at House District 70. This is page 28, Figure 7 from the Rodden report, Exhibit 69. This is Delores McQuinn's district; is that right?

A. Yes.

Q. This district was just about right on target for population?

A. In isolation, yes.

Q. And relatively heavily African-American?

A. That's my understanding, yes.

Q. So what was moved out of the district was these VTDs we keep talking about, 701, 702 and part of 703. Those were moved into House District 71, right?

A. Yes.

Q. And each of those areas had a very high concentration of African-American voting age population, right?

A. Yes.

Q. And adding -- the addition -- excuse me. Let me start over. In addition to balancing population, those precincts were moved for the expressed purpose of increasing the black voting age population in HD 71?

[737] A. Yes. It had that effect.

Q. And --

JUDGE PAYNE: The question was was it for that purpose, not whether it had that effect. The question was whether it was for that purpose. Is your answer still yes?

A. I'm sorry. Could you repeat the question, please?

Q. In addition to balancing population, these precincts were moved for the expressed purpose to increase the black voting age population in HD 71? That was one of the reasons, wasn't it?

A. That was one of the reasons. As discussed, District 71 had 46 percent black voting age population in the benchmark plan and it had a higher number in the enacted plan.

Q. And were you here yesterday when Delegate Jones was testifying?

A. Yes.

Q. And you recall him testifying that the 55 percent black voting age population was the reason for that change?

A. I recall him saying that.

Q. Okay. Now, did I hear you say that -- that population from District 27 went into District 70 because District 70 already had some Chesterfield VTDs? Is that [738] what you said?

A. Yes.

Q. Okay. And District 70 had just one VTD in Chesterfield County in the benchmark, right, Drewry's Bluff?

A. Yes. Drewry's Bluff is adjacent to the areas that were brought into District 70.

Q. And District 69 had four VTDs in Chesterfield County in the benchmark, right; Beaumont, Davis, Belmont, Manchester? Those are all in Chesterfield County?

A. Yes.

Q. And District 69 was dramatically underpopulated at the time of the redistricting, correct?

A. Yes.

Q. District 70 was right about on target, in terms of population?

A. Yes.

Q. Let's move to District 74. This is the one that sort of looks like a meat cleaver. I don't mean no disrespect to your map drawing here, but -- do you recall this one?

A. Yes.

Q. This -- there are two split VTDs up in the northwest tip. And this is Figure 9 on page 33 of the Rodden report.

MR. HAMILTON: If we could show that.

[739] Q. Brookland and Belmont, you testified about those a little bit earlier?

A. I did about those two.

Q. Let's start with Belmont. That VTD was split in the western portion of the VTD along with the Canterbury VTD just in the south were both moved into District 72; is that right?

A. Yes.

Q. And you don't know whether that movement was for population or for some other reason, correct?

A. No. I explained that Canterbury was added to District 72 because it's a republican performing precinct.

Q. In your deposition, at least -- I gather you've refreshed your recollection since your deposition because you couldn't recall a specific reason then. Do you remember that?

A. I'm aware of the voting preferences of Canterbury precinct.

Q. Do you recall testifying in your deposition, "I don't know if there was a specific reason. I just know that that is the -- that the border ended up there"? Do you recall that?

A. Yes.

Q. Another portion of Belmont that was left in District 74 was primarily African-American, wasn't it?

[740] A. I'd have to look at the numbers.

Q. You can't tell from looking at this map?

A. No, I cannot tell from looking at this map. This map has no numbers.

Q. And the portion of Belmont that was moved into District 72 is predominately white, wasn't it?

A. It appears so.

Q. And Canterbury itself is predominately white, correct?

A. It's a senior requirement home and villas, yes.

Q. Well, I actually asked you about the racial composition, not whether it was a senior retirement home, because I assume that's sort of race neutral. Canterbury, the portion -- I'm sorry. Canterbury itself is predominately Caucasian; isn't that true?

A. Yes.

Q. Okay. Thanks. Now, Brooklyn to the north, that one was also split, wasn't it?

A. Yes.

Q. And that split was to equalize population?

A. Yes.

Q. And the split of that one -- it's a little hard to see -- but that's a small vertical line just to the left of the B in Brooklyn, correct. That's where the split of that VTD is?

[741] A. Yes. The VTD boundary is this, and the split is right in the middle of that.

Q. Perfect. Thank you. The western portion is largely white?

A. It's hard to tell from here. Yes. I'll say yes. Sure.

Q. And the eastern portion is predominately African-American?

A. I don't agree with that.

Q. Okay. Now, you also fixed --

MR. HAMILTON: Let's go back to the preceding map, if we can.

Q. You also fixed a -- I think you said fixed a river crossing here down at the bottom of the southern boundary of District 74; is that right?

A. Yes.

Q. Now, there's also a water crossing of the Appomattox River in House District 74, correct?

A. I don't think so.

Q. There are water crossings in House District 68, 70, 80 and 69 in the final HB 5005, correct?

A. I'm sorry. You're asking me about at Appomattox River and District 74?

Q. No. This is actually a different question now.

A. Okay.

[742] Q. Because you disagreed on the Appomattox. I'll let the maps speak for themselves on

that. I'm just asking you now, you'll agree with me that the final map had river crossings in several districts?

A. Yes.

Q. Those included House District 68, 70, 80 and 69, correct?

A. Just a moment. Could you repeat them slower?

Q. Sure. We'll start with 68?

A. Yes.

Q. Seventy?

A. Yes.

Q. Eighty?

A Yes.

Q. And 69?

A. Yes.

Q. Thank you. Let's turn to House District 63. This is Delegate Dance's district?

A. Yes.

Q. Now, this district -- this southern line splits Dinwiddie County, correct?

A. Yes.

Q. I think the Court called this avowedly racial. Do you remember hearing about that from the memorandum opinion after the first trial?

[743] A. I've heard it mentioned in this trial. I don't remember reading that.

Q. Okay. And the split that we're talking about is this split right through the middle of Dinwiddie County, right?

A. That's the portion that's split between 63 and 75, yes.

Q. The reconfigured House District 63 divided Fort Lee, doesn't it?

A. Fort Lee is divided between 62, 63 and possibly 64. I can't tell from this map.

Q. Okay. Now, there were several VTDs that were split in this area. Let's start with the Reams VTD. I can't remember. I think we've got a closer map. Do you recall the Reams VTD on this?

A. I don't see it on the map. I do recall it, yes. I am familiar with the VTDs in this area. I spent a lot of time working in this area.

Q. Okay. And one of the --

JUDGE PAYNE: Would it help you to have one of those bigger map books nearby to look at?

MR. HAMILTON: I think they're right in front of him.

JUDGE PAYNE: Oh, okay. All right. Then if he wants to, he can look at them.

A. Okay. Do you want me to look at the map books?

[744] Q. Let's start and see what you can remember. You've got a pretty good memory. So let's see where we go. And if you need to, just let me know, and I'm happy to stop and --

A. I would be happy to see a map that shows the precinct boundaries if we're going to talk about that.

JUDGE PAYNE: Are those in the big map book?

MR. HAMILTON: I don't know, Your Honor. I don't know. Give me just a moment and let me look.

JUDGE PAYNE: House District 63 I think is what we're talking about.

MR. HAMILTON: That is exactly what we're talking about.

JUDGE PAYNE: Mr. Raile, do you know that?

MR. RAILE: This image on the screen or -- oh, the regional map is Intervenors' Exhibit 96 and 97, and I believe --

JUDGE PAYNE: That's all right. She's over there looking to see if -- he's looking for something with specific -- did you find it, Mr. Morgan?

A. Yes. It's Defendant-Intervenors' Exhibit 91. Page 126 is the one I'm looking at.

JUDGE PAYNE: Page 126?

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: All right.

[745] A. And that does show the voting district boundaries, I think.

Q. All right. I want to focus your attention on the Reams VTD. One of the reasons this VTD was split was this is an area where two sections of the map sort of came together and you were putting those pieces together; is that right?

A. Yes. This is one of the very few points in the plan where a voting district is split between three districts; between 62, 63 and 64. On the north side of the Reams, it's split at District 36 -- or Highway 36, and at the lower end, it's Interstate 295. That's what the split of Reams is primarily -- or entirely.

Q. And the other reason this VTD was split because of the census block in this area was large and the VTD was split to balance population; is that right?

A. My answer to that is that the census blocks around Fort Lee were large. In some cases, they had large population. In some cases they had small population. It was difficult to work with census blocks in this area around Fort Lee.

Q. And is this the here we're talking about?

A. No.

Q. Okay. Can you point to us where we're --

A. We're talking about this area here.

[746] JUDGE PAYNE: "This area here" is in the right-hand part, including -- what are the names of these?

THE WITNESS: The voting districts are Jefferson Park, Reams, Courts Building, which are all in Prince George County. And those are the areas -- when I talk about Fort Lee, that I'm primarily talking about those areas. And I think, again, the Defendant-Intervenors' Exhibit 91, page 26, shows those boundaries fairly clearly. The map on the screen is okay.

JUDGE PAYNE: The map on the screen is not 94. It's 94. Is that right?

THE WITNESS: Okay.

MR. HAMILTON: That's right, Your Honor.

BY MR. HAMILTON:

Q. The Rohoic VTD was also split, right?

A. Yes. That's in a different area of the district.

Q. That's this sort of finger that goes around New Hope; is that right?

A. Yes.

Q. And that one was split to go around New Hope to get additional population; is that right?

A. Essentially, yes.

Q. The Dinwiddie VTD was also split for population balancing; is that right?

A. It's split along I-85, yes.

[747] Q. But the reason -- again, I'm not asking you where it was split. I'm asking you why it was split. It was split for population balancing, correct?

A. Yes.

Q. Okay. And Chris Jones didn't direct you on how to specifically split those three VTDs, Rohoic, Dinwiddie and Reams, did he?

A. I -- what I said in my testimony earlier I'll repeat here because it helps understand the situation.

Q. Well, why don't we start with just answering my question.

A. Go ahead, please.

Q. He didn't direct you specifically how to split those three VTDs?

A. He gave me some direction in that area.

Q. Did Chris Jones direct you specifically how to split either Reams, Rohoic or Dinwiddie?

A. I'm going to say that he gave me some input on that. And what I mean by that is that from my point of view as a map drawer, that line was negotiated

between Delegates Tyler, Dance and Chris Jones, and I was -- this was the line that was negotiated.

Q. So Chris Jones did not direct you to -- or did or didn't direct you to specifically split these three VTDs? A Not specifically in this way. But what I want to say [748] is that once these splits were made, they were accepted by the delegates and they were not changed again after that point.

Q. Okay. Fair enough. Thank you for the clarification. But the way that they were split was you. Mr. Jones -- Delegate Jones didn't tell you, Split them this way. That was your decision?

A. Yes.

Q. Thank you. Now, the map in this area also split Jefferson Court -- I'm sorry. Jefferson Park, Courts Building and Hopewell Ward 7, correct?

A. Yes.

Q. Jefferson Park VTD was split because it was on the border -- or I think you described it as the fault line between the Tidewater and Richmond maps when they came together and to help balance population, correct?

A. Yes. And that is the voting district that primarily contains Fort Lee.

Q. And the Court Building VTD was split in part because of an island in the river, in part because of the boundary between Richmond and Tidewater regions, and in part to balance population; is that right?

A. Yes.

Q. And then Hopewell Ward 7 was also split?

A. Yes.

[749] Q. I think we have a map of that. And I think you testified that this VTD was split to equalize population and it was easier to do here because the census blocks within this VTD were relatively smaller; is that right?

A. Yes. In this case, there are 800 people or a little over 800 people, 700 or so are in one block. But after that, there's smaller blocks that allow you more flexibility in -- in making census block divisions between districts.

MR. HAMILTON: And, Ms. Marino, can you blow up the center of that right in here? Maybe a little bit further south. There you go.

Q. So we can actually see the census block and I apologize because they are not very clear, but these faint lines, that looks like census blocks to you, doesn't it?

A. Yes. That shows precisely what I'm talking about. There's one census block here, which has about 700 people, and then these are smaller population blocks going forward. And this one block I think comes like that.

Q. Right. And there's another one here, and then there's a whole bunch of them here?

A. Yeah. Exactly. Yeah.

Q. And there's a whole bunch of them here?

A. Yep.

Q. And you can pick any of those. The ones you picked [750] was this big one you drew a circle around?

A. No. I couldn't pick any of those. I could pick ones that were on the border with the district that needed population, which was District 63.

Q. And the one that you picked is -- just happens to be the heaviest concentration of African-Americans in the entire ward?

A. Yes. It's on the border with District 63, and this is the Hopewell border. So in the last phases of this process, that was one of the last splits introduced as a result of changes made in District 64, 75 and the Richmond area seats. This is the junction where the districts met. This was one of the last splits made in the plan.

Q. Sure. And the split -- so that we're clear, the split that we're talking about is -- if I can make this work. The dotted line is the Ward 7 boundary? This is the district split, correct?

A. Yes.

Q. And the pocket that's carved out here is the only significant concentration of African-Americans in the entire ward; isn't that true?

A. This map is -- shows the dots. It doesn't show the location of people. But it has African-Americans in it, yes.

Q. Now, you knew at the time you split this VTD in your [751] experience, you assumed or knew that African-American voters were more likely democrats; isn't that true?

A. In my experience, that's usually the case.

Q. And you knew it at the time you did the split?

A. Sure.

Q. And you knew that Ward 7 was Delegate Ingram's least performing ward in the city, correct?

A. I knew that, yes.

Q. Now, you also said that Delegate Ingram didn't want all of Hopewell. Is that what I heard you say?

A. What I said was that he had not represented that in the 2001 benchmark plan and that adding additional population would lower the portion of his district that was retained in the new district.

Furthermore, I said that Delegate Ingram was one of the last delegates on the republican side to agree to supporting the plan.

Q. So let's take a look at Figure 10, page 34 of the Rodden report. We're talking about Hopewell, the northern end of House District 63, correct?

A. Yes.

Q. And Delegate Ingram represents this area up here where the number 62 is. That's his district, right?

A. Yes. It goes into Chesterfield and eastern Henrico.

Q. And it was late in the process, he hadn't represented [752] it before, of course, because Hopewell had been in District 74 in the benchmark, right?

A. Yeah. District -- those portions of Hopewell were in District 74, yes.

Q. And so Delegate Ingram ended up only taking part of Hopewell, right?

A. He retained the portion of Hopewell that he already had, and he lost the small portion of Ward 7 that we looked at earlier. Otherwise, he retained the

same portions that he had in the benchmark plan. His changes were made in other parts, particularly in Chesterfield where a lot of new population was added. His district was below 60 percent retained, which is one of the lower of the republican members.

Q. Right. But the part of Hopewell -- he didn't want to take all of Hopewell, correct?

A. That was my understanding, yes.

Q. And the only part of Hopewell he didn't already have was the African-American part of Hopewell?

A. Ward -- yeah. Ward 2 and Ward 6.

Q. That's the eastern part of the city, correct?

A. The portion that was in District 74 he had not represented in 2001, that's correct, and forward to 2010.

Q. Now, you said -- you testified on direct about -- something about Hopewell not being necessary to reach, and [753] you didn't need to assign Hopewell to one district or another in order to reach the 55 percent black voting age population. Do you recall that testimony?

A. Yes.

Q. And you said you prepared a couple of other plans and it took you about 10 or 15 minutes to generate those plans showing that; is that right?

A. In this case, it was easy to do.

Q. Okay. It was easy to show that Hopewell didn't need to go all the way into one district or another. Is that your testimony?

A. I'm not sure I understand the question.

Q. Your testimony is that it was -- it was easy to show that Hopewell didn't need to go into one of the challenged districts to reach 55 percent black voting age population, the racial target, correct?

A. Putting Hopewell in a district other than 63 -- yes. The short answer to your question is yes.

Q. Okay. Thank you. And the map, as drawn, at the risk of flagellating an equine, is this one that's that split the question?

A. Yes.

Q. Thank you. Let's turn to House District 92 and 95. These two are in the Tidewater region, correct?

A Yes.

[754] Q. Fair to say that we have to look at these two districts together as a group?

A. Yes.

Q. And District 95, the most significant change to District 95 is this whole arm reaching up to the right; is that right?

A. In my opinion, that is the most significant change, yes.

Q. Okay.

MR. HAMILTON: Could we take a look at Defendant-Intervenors' Exhibits 96 and 97, page 2? And, Your Honors, this is the big book. And we're going to put them up side by side like we had them before.

JUDGE PAYNE: What page?

MR. HAMILTON: Page 2.

Q. All right. These -- I apologize for the size of these, but can you see these here?

A. Yes.

Q. Okay. You said that most of the districts in this area had to be elongated. I think that was your testimony on direct. Is that correct?

A. Yes. In this area, the districts were constrained by the York River and the James River.

JUDGE PAYNE: "This area" meaning the peninsula?

THE WITNESS: Yes, Your Honor.

[755] Q. And that's because of the population distribution and changes from -- over the course of the preceding ten years, right?

A. Yes.

Q. So -- so let's -- let's look at that. I'm going to grab the paper copy because I think it's easier to see in the paper copy than these small maps. So District 94, that's that one, right?

A. Yes.

Q. And so if we look on the screen, we're looking at --

JUDGE PAYNE: Which one are you talking about, in 2001 or the 2011?

MR. HAMILTON: I was just going to clarify that for the record, Your Honor. The left-hand screen corresponds to the top page of the paper copy of Defendant-Intervenors' Exhibit 96. That's page 2. And the right side of the screen that's displaying here in the courtroom corresponds to Defendant-Intervenors' Exhibit 97, page 2, which is on the bottom of the paper

copy. So if we start first with Exhibit 94, the benchmark is on top or on the left-hand side and the adopted plan is on the right-hand side or the bottom.

Q. Are we all -- do you agree with that?

A. Yes, I do.

Q. Okay. Thanks. So first we're going to look at House [756] District 94, and I put dots on it. That's kind of the -- boy, I'm terrible with colors, but I think it's sort of the orangey in the benchmark and it looks a little pink to me in the adopted plan.

JUDGE PAYNE: Color aficionados would probably call it salmon.

MR. HAMILTON: Salmon. You would think I would know that color.

Q. So that one didn't really become elongated, did it?

A. No. In my testimony I said that --

Q. No. The question is yes or no.

A. No, it did not become elongated in distance. That's correct.

Q. Okay. Thank you. And let's look at House District 92, the purple one and the sort of dusty blue one. Maybe it's gray. That one didn't become elongated either, did it?

A. That's correct.

Q. And if we look at House District 91, that one didn't really become elongated. In fact, it became sort of more compact, right?

A. Yes.

Q. District 93 was already kind of elongated and remained so, correct?

A. It became more elongated going into James City.

[757] That's what I was describing.

Q. Okay. And then the one that changed perhaps the most is, of course, District 95?

A. In terms of geography, District 95 and District 93 changed the most.

Q. Now, let's go back to Dr. Rodden's report. And if we could go to Figure 16 on page 47 of his report. Now, this is the northern end of this arm stretching up in House District 95; is that right?

A. Yes.

Q. And I think I -- if I heard your testimony correctly, this area up here in the -- in the northern part, Reservoir, there was a partisan gerrymandering effort here in order to move this district in such a way as to help some of the republican incumbents in the area; is that right? Did I hear you right?

A. Reservoir was moved to District 93 -- I'm sorry -- from District 93 to 94 and 95, yes. It affected District 93 principally.

Q. But if I heard you correctly, the reason for that, there was a political reason for that. You moved those in order to help the republican incumbents in 94 and 93?

A. District 93 did not have a republican incumbent. It was drawn in such a way to make District 93 more competitive for a potential new

candidate. And that was [758] precisely why that was done.

Q. And precisely on a partisan gerrymandering basis?

A. It was -- it was an effort to move democratic precinct Reservoir and Epes out of District 93, into other districts.

Q. Okay. And in order to do that, you had to draw this arm that went all the way up, up the road here in order to get to Reservoir?

A. Yes. As I said earlier, District 93 incumbent lived at the southern end of the district and most of her population was at the north. And so ultimately, she was paired with another incumbent, but she moved around in the district.

Q. Let me stop you there --

A. Sure.

Q. -- and ask you to listen to my question. My question is in order to get to Reservoir, you had to add all these little roads to get there?

A. Yes.

Q. Sort of the road to Reservoir. And in order to -- once you did that, you realized if you included all of Epes or Denbigh or Jenkins, you'd have too much population. Is that what I heard you say?

A. Basically that's true. If adding all of Denbigh -- adding all of Denbigh would not allow Epes and Reservoir [759] to be affected and split with most of its population out of 93.

Q. So you had to start splitting VTDs here, carving off census blocks from each of these VTDs in

order to equalize population. That's what you said, correct?

A. It does equalize the population between 95 and 94. And also, as I said, it was to bring the -- less of Epes into 93 in this case. None of Epes in 93.

Q. Sure. And when we got to the end, when you -- you just stopped when you had enough in order to equalize the population, correct?

A. Yes.

Q. And you weren't looking at race filters or racial data filters on Maptitude when you did this. It just happened to be that when we carved out just enough census blocks, the line just happened to end there?

A. Actually, as it relates to Reservoir, Reservoir was split three ways and --

Q. But I'm not asking you about Reservoir now.

A. Yes, you are. You're asking me about Reservoir, and I'm answering about Reservoir. That area you just pointed to is, in fact, Reservoir, and it was split that way because the underlying census geography and the population figures allow it to be split in that way. And that is exactly how it's split. This map does not have the census

[760] block boundaries. It would be easier to show that with a map that showed census block boundaries.

Q. So putting Reservoir aside, because I know that was the target you wanted to get to, to get up to Reservoir, you had to split all these other VTDs?

A. Reservoir, Epes, Denbigh were split.

Q. And Jenkins?

A. And Jenkins was split. Yes. In this area, yes.

Q. Thank you. Now, you'll certainly agree with me that the way the resulting line ended, however it got there, neatly divides the after African-American from the white population -- predominately white population, correct?

A. I really can't tell from this map.

Q. Let's move to House District 80. This is the South Hampton Roads area; is that right? House District 80?

A. It is. There's a map.

Q. This district was heavily underpopulated by about 9000 people, right?

A. Yes.

Q. And the major change was this whole west arm of the district, right?

A. Geographically, that appears to be the major change, yes.

Q. There's another change that we can focus in on here. There's this little finger right there, and it's the VTD [761] 11 right here in the center of the district. Do you see that?

A. Yes.

Q. And that VTD was added. That's another change here, right?

A. Yes.

Q. It was not in the benchmark?

A. That's correct.

Q. And the reason that this VTD was added was to equalize population between House District 79 and 80?

A. That's the way it was added. It wasn't necessary to equalize population in the sense of splitting VTDs like the other ones were.

Q. Right. But the reason that this VTD was added was to equalize population between District 79 and 80?

A. Sure.

Q. It just didn't require splitting a VTD?

A. Right.

Q. And any of the VTDs that formed the border between 79 and 80 could have been used to equalize the population between these two districts, assuming it was the same size population?

A. Okay.

Q. That's right, isn't it?

A. Sure. Yes.

[762] Q. The one that was chosen is heavily African-American, isn't it?

A. It appears so.

Q. And, in fact, if we look at all of the VTDs that form the border between Districts 79 and 80, this is the single, most concentrated population of African-Americans, isn't it?

A. I'm not sure.

Q. All right. Let's move to House District 89. This one is underpopulated by about 5000 people at the time of the redistricting, correct?

A. Yes.

Q. And maybe if we look at the southern part of the district, fair to say it reached south and picked up a number of precincts from House District 80, right?

A. I don't think so.

Q. It picked up Berkley?

A. Yes.

Q. It picked up Hunton?

A. Yes. Yes. Those are from District 80.

Q. It picked up Union Chapel?

A. That was not from District 80 that I'm aware of.

Q. But it picked it up?

A. Yes.

Q. And it also added part of Brambleton?

[763] A. Yes.

Q. And the reason for all these changes was to add population, correct?

A. Ultimately, yes.

Q. And by adding the Berkley VTD, it actually created a water split here that didn't exist before, right?

A. Okay. It's -- Berkley is in the city of Norfolk. So --

Q. And that's across the river from the rest of House District 89?

A. Okay. Yes.

Q. And that one, the one that was added, that's a highly concentrated African-American population precinct, correct?

A. Yes.

Q. Brambleton was split. Why was -- Brambleton was split for population balance reasons, correct?

A. Yes.

Q. Brambleton was a 96 percent black voting age population precinct, correct?

A. I don't have the figures in front of me.

JUDGE PAYNE: Ninety-six percent increasing?

MR. HAMILTON: No. No. Ninety-six percent black voting age population.

JUDGE PAYNE: Oh.

[764] Q. The exact numbers -- I won't take the time. I'll just -- it's already in the record. It's Plaintiffs' Exhibit 63 on line 121. Brambleton had a total black voting age population of 3403, of which only 60 were white. Does that sound about right to you, sir?

A. Okay.

Q. And Brambleton was split between House Districts 89 and 90?

A. Yes.

Q. Both of those are among the challenged districts, right?

A. Yes.

Q. And the reason for splitting Brambleton was population balancing?

A. Yes.

Q. And it's fair to say that there were other choices that you could have made to balance population between these two districts, 89 and 90?

A. The split was made at the end of the process, and Brambleton was already split. So that was the one that was chosen to split additionally.

Q. But other than population equalization, there's no other reasons fore that line being where it is?

A. Correct.

Q. Let's look at the north end of that district.

[765] Rosemont was already in District 89, and Delegate Jones chose to leave it in the district; is that right?

A. Yes.

Q. That's right here. And then next-door is Suburban Park. We've been talking about that a little bit during this trial. That one was in the benchmark but taken out, correct?

A. Yes.

Q. And the reason for leaving Rosemont and excluding Suburban Park was population equalization again, correct?

A. Yes. With District 100.

Q. And Rosemont is heavily African-American?

A. Yes.

Q. Black voting age population is about 82 percent? Does that sound about right?

A. That could be right.

Q. Exhibit 63 has the exact numbers, but I won't take the time to go there. Suburban Park is mostly white?

A. I believe so.

Q. So let's look at the left side of this. And I believe we have a close-up view of Granby that we've been looking at here. This is the next VTD to the west from Suburban Park, correct?

A. Yes.

Q. And there's a split VTD that you were talking about [766] on direct. That VTD is split -- I'm sorry -- in the northern part, correct?

A. Granby was split in the benchmark plan, and it's also split in the enacted plan, yes.

Q. Right. And it's split in a different way in the enacted plan?

A. Yes.

Q. I think you said in the adopted plan, it was split something like that?

A. Yes. That's correct.

Q. More or less, for the record sort, of a horizontal line with a little bit of a jog in it?

A. Yes.

Q. And the new way it was split was to make this sort of northwest corner segment that demarks the higher concentration of African-American, right? That's the way it was split?

A. I described the way it was split earlier using census blocks underlying this geography.

Q. You didn't discuss this split with Delegate Jones, did you?

A. No.

Q. And the reason you drew this, I think you testified, was population equalization between the two districts?

A. Yes. District 89 and 100 needed to be equalized, and [767] this is how it was accomplished.

Q. And this split had nothing to do with a funeral home, right?

A. That's correct. As far as I know, it did not.

Q. You're not one who drew it.

A. I drew it, yes.

Q. And it had nothing to do with a funeral home?

A. That's my understanding.

Q Well, I mean, nobody else would know because you're the one who did it. So --

A. This is what I know, yes.

Q. Thank you. Let's move to House District 90?

MS. MCKNIGHT: Your Honors, I'd just like to point out to the Court that we are now well beyond the hour of cross-examination that plaintiffs identified on their estimations in Docket 209. Understanding we went beyond our time by about 30 minutes, we wouldn't expect plaintiffs to go much beyond, I don't know, an additional 15, which would put us at about 3:00 when they're --

JUDGE PAYNE: He's already been eight minutes over. So that's as far as we've gotten.

MR. HAMILTON: Your Honor, I've --

JUDGE PAYNE: I'm sure he'll truncate it.

MR. HAMILTON: Sure. It was a 3 and a half hour direct. I'm not actually planning on spending more

than [768] about 15 or 20 minutes. I'll move it long as quickly as I can, Your Honor.

JUDGE PAYNE: All right.

Q. Let's turn to House District 90. This is down near Virginia Beach; is that right?

A. Yes.

Q. There are two split VTDs here?

A. No.

Q. Aragona is split, isn't it?

A. Yes.

Q. And Reon is split?

A. Yes.

Q. And the VTD Shell is split?

A. Yes. That's the third one.

Q. Okay. Thank you. Speaking first, focusing first on Aragona, that one was split for population reasons?

A. I'm sorry. May I correct something?

Q. Sure.

A. There was a fourth split that we discussed, it's Brambleton, which is on the west side of the district.

Q. Thank you. So Aragona, that one was split for population equalization reasons?

A. Yes.

Q. And Shell, you split that one as well for the same reason?

[769] A. Yes.

Q. You didn't discuss the Shell split with Delegate Jones, did you?

A. No.

Q. And if we look at this, the Reon split, I think you said that was the last one chronologically.

A. Yes.

Q. And I think we have a blowup of that.

MR. HAMILTON: It's Figure 21 on page 59 of the Rodden report. It's Figure 23, page 61.

JUDGE PAYNE: That's not the one that's up on the screen, I don't think.

MR. HAMILTON: I know. We're fixing that. There we go.

JUDGE PAYNE: Go it now.

MR. HAMILTON: Thank you.

Q. So the Reon VTD, you said, was the last one chronologically that was split; is that right?

A. Yes.

Q. And that's right here. And the reason it was split was for population balancing as well?

A. Yes.

Q. And that's equalized population between Districts 85 and 90?

A. Yes. What I pointed out was that in the [770] redistricting process, at the last part of the process, District 85 and 90 were out of alignment, and this was the place where the population was rectified.

Q. Politics had nothing to do with the way you split Reon? This was just population equalization between these two districts?

A. Yes.

Q. Let's turn to House District 77.

MR. HAMILTON: This is Figure 24 on page 63 of the Rodden report. Actually, Figure 26, if you would, on page 68 of the Rodden report.

Q. The far western edge of District 77, there are two VTDs that were split?

MR. HAMILTON: Figure 26, page 68, please.

Q. One was Lakeside. That district was split, correct?

A. That voting district was split, yes.

Q. And that's near Suffolk?

A. It's in the town of Suffolk, yes.

Q. You drew the lines making that split?

A. Yes.

Q. Eastern side of that split is heavily

African-American?

A. The split was made between the border of Old Towne, and then moving along the census geography towards the --

Q That's not my question. My question is the eastern [771] part of VTD split was heavily African-American; isn't that right?

A. It looks like it.

Q. And the western part of the split was predominately white; isn't that true?

A. It looks mixed to me.

MR. HAMILTON: Thank you. No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. RAILE:

Q. All right, Mr. Morgan. I'll try to keep this brief. I know you've been here for a while. You answered several questions about different VTD splits that Mr. Hamilton asked you and I asked you. And your testimony summed up was it was for equalizing population or population equalization, or language to that effect. Do you remember those answers?

A. Yes.

Q. When you answered those questions that way, did you understand the phrase population equalization or equalizing population to describe that process that we talked about earlier this morning with the census geography and so on and so forth as being included in that term?

A. Yes. We described it earlier as building blocks, [772] Legos population and the underlying census geography. Yes, it's included in that answer.

Q. So included in that is a priority of not splitting census blocks; is that right?

A. My understanding is it's not really possible to split census blocks in the redistricting software, and I don't believe that was even contemplated in any of this process in Virginia.

Q. And Mr. Hamilton asked you if population is fungible. And remind me, what's your response to that?

A. Population can be moved between districts. In that sense, I guess it's fungible.

Q. But when you're redistricting, you're using census blocks; is that right?

A. Yes. The --

Q. Are census blocks fungible?

A. The census blocks are the geography that they are. They have a population value that reflects the population that was found to be there during the census. So it's tied -- specifically, population values are tied to the geography.

Q. A large census block with a small number of people cannot be traded for a small census block with a large number of people; is that right?

A. They wouldn't be equal in population.

[773] Q. So let me ask you again. Are the census blocks fungible? Can you just pick any one?

A. No, you can't pick any one. You have to consider the shape of the census block in the sense of the contiguity issues that we've discussed and also the population of the census block. They are inextricably tied.

Q. Now, I believe Mr. Hamilton asked you about District 80 and the precinct called 11?

A. Yes.

Q And I -- you know, for the sake of time, I don't want to put up that map. But he asked you, I believe, sort of all else being equal, you could have picked any VTD from 79 to put into 89 to equalize population. Do you remember that question?

A. I do.

Q. And you answered that question yes, right?

A. I did.

Q. Let me ask you this. Is all else equal?

A. No. You would have to look at the population of the voting district and its effect on the surrounding district in the population.

Q. So when you testified that is for the purpose of equalizing population, that's the process you're describing; is that right?

A. Yes.

[774] Q. And not just any VTD will do; is that right?

A. That's right.

MR. HAMILTON: Objection. Leading.

JUDGE PAYNE: I think it's -- it is, and I know we're trying to move along, but --

MR. RAILE: Sure.

JUDGE PAYNE: Sustained.

BY MR. RAILE:

Q. Will any VTD do?

A. No.

Q. Will any census block do?

A. No.

Q. Mr. Hamilton asked you about your attendance at trial in 2015. Do you remember that?

A. Yes.

Q. Who subpoenaed you then?

JUDGE PAYNE: Do we really need to get into that? Do you think we're going to pay some attention to that? What kind of finding of fact would I make on that?

MR. RAILE: Your Honor, I don't know.

JUDGE PAYNE: Let's go. No, that's a good answer.

MR. RAILE: If I knew, I could make this really short.

JUDGE PAYNE: All right. Well, you know.

[775] BY MR. RAILE:

Q. Who subpoenaed you?

A. I believe the plaintiffs subpoenaed me.

Q. So they could have called you to testify for three hours in 2015?

A. Yes. And Mr. Hamilton said that he might call me and asked me to stay.

Q. How many times has Mr. Hamilton deposed you?

A. I believe three times.

Q. He could have asked you all the questions I asked you this morning?

A. Yes.

Q. Finally, Mr. Hamilton asked you about -- I believe he phrased it as payment for your -- for your testimony. Do you remember that?

A. Yes.

Q. Now, just to clarify the record, do you understand that the payment is for your time and effort and not for anything that you're saying here today?

A. Yes, I understand that.

Q. Okay.

MR. RAILE: Thank you, Your Honors. No further questions?

JUDGE PAYNE: I think we understand all experts get paid for their time and they're not just being paid to [776] say -- I have a question for you.

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: You mentioned a number of river crossings and Mr. Hamilton asked you about that were not remedied, and the only one I remember was in somewhere in District 68, but there were three or four of them. Do you know the river crossings I'm talking about?

THE WITNESS: Yes, I do.

JUDGE PAYNE: Were they in the benchmark plan?

THE WITNESS: District 68 was in the benchmark plan, yes.

JUDGE PAYNE: How about the other river crossings?

THE WITNESS: District 69 was in the benchmark plan, yes. District 80 was in the benchmark plan, yes. District 70 was in the benchmark plan, yes.

JUDGE PAYNE: All right. Thank you.

MR. RAILE: Your Honor, I do have a follow-up question on that.

BY MR. RAILE:

Q. Eighty-nine --

JUDGE PAYNE: I knew I shouldn't have done it. Yes. Go ahead.

MR. RAILE: I apologize. I just wanted to clarify.

[777] Q. Eighty-nine wasn't; is that right?

A. Eighty-nine was not. It's in the area of Norfolk.

Q. Is there a freeway that runs across that river in that precinct that was added?

A. It's a tunnel, but it's a freeway. Yeah.

MR. RAILE: Okay. Thank you.

JUDGE PAYNE: What is it, 666?

THE WITNESS: If I may.

JUDGE PAYNE: It's all right. It doesn't make any difference.

THE WITNESS: It's 264/464.

JUDGE PAYNE: 264. All right. Thank you. Can he be excused? Do you need to keep him around?

MR. RAILE: No. He's excused from our perspective, Your Honor.

JUDGE PAYNE: Mr. Hamilton?

MR. HAMILTON: He's excused from our perspective.

JUDGE PAYNE: Thank you very much for giving us your testimony, Mr. Morgan. You're excused.

THE WITNESS: Thank you, Your Honor. (Witness stood aside.)

MR. BRADEN: I'll scoot up here. Dr. Jonathan Katz.

[778] **JONATHAN KATZ,**

was sworn and testified as follows:

MR. BRADEN: Your Honors, we've got witness binders which I hope will enable us to move expeditiously.

JUDGE PAYNE: Thank you, ma'am.

DIRECT EXAMINATION

BY MR. BRADEN:

Q. Can you tell the Court your full name?

A. Jonathan Neil, N-E-I-L, Katz, K-A-T-Z.

Q. And your present position?

A. I am the Kay -- K-A-Y -- Sugahara, S-U-G-A-H-A-R-A, professor of social sciences and statistics at the California Institute of Technology.

Q. And have you been an expert witness in many redistricting cases before?

A. Yes.

Q. And have you testified for both republican and democratic and nonpartisan stakeholders?

A. Yes, including plaintiffs' counsel here in previous cases.

Q. I'd like to bring up Defendant-Intervenors' Exhibit 16. Do you recognize that document?

A. I do.

Q. Can you tell the Court briefly what it is?

A. It's my expert report from the previous trial in [779] 2015.

MR. BRADEN: Your Honors, I will not ask the witness to extensively discuss this document and go over what's already been presented, but I do want to ask a couple questions in regards to responses by the plaintiffs' witnesses on this document.

JUDGE PAYNE: All right.

Q. Dr. Katz, can you bring up page 1 of your report?

A. I have it.

Q. Okay. And there's a series of five bullet points on page 1. Let me do the first bullet point here.

A. Would you like me to read it?

Q. Yes. Just briefly. Just read it to the Court.

A. "Dr. Ansolabehere's choice of particular compactness measure used in his analysis is arbitrary and not justified. Using an alternative and more justified measure of compactness, I show that HB 5005 map is as compact as the benchmark map."

Q. And after hearing -- were you -- you've had an opportunity to review the new expert reports from the plaintiffs in this case. Do they have any impact on that finding?

A. I do not believe so.

Q. And did you hear any testimony that impacted that -- your conclusion there?

[780] A. I have not.

Q. If we can go to bullet point number 2.

A. "Dr. Ansolabehere's ecological regression analysis of racially polarized voting is flawed using a discredited statistical method and does not examine the most relevant elections, those for the House of Delegates."

Q. Was anything provided to the Court in the expert testimony or the expert reports presented in this trial that would change your mind on that?

A. No.

Q. Bullet point 3. Let me read that to you. Save -- while you get the water. "I show that elections for the Virginia House of Delegates in the contested districts show substantial racially polarized voting using the currently accepted statistical methods." Anything in any of the expert reports presented in this case to change your mind on that?

A. They do not.

Q. Did you hear any testimony that would change your mind on that?

A. No.

Q. You still believe there's substantial racial polarized voting in Virginia?

A. I do.

Q The next bullet point. "In the contested elections, [781] my analysis shows that the black voting population of 55 percent predicts only an 80 percent chance of a black candidate winning that election."

JUDGE PAYNE: Winning that district.

Q. In the contested district, my analysis show that a black voting age population of 55 percent predicts only an 80 percent chance of a black candidate winning that district." Anything presented in any of the expert reports from the plaintiffs that change your opinion on that?

A. No.

Q. Did you hear any testimony in this case that would lead you to change your opinion on that?

A. No.

Q. We go to bullet point -- I'll read it. "I show that Dr. Ansolabehere's" -- and fortunately he's not here, since I'm butchering his name. Excuse me -- "results on the inclusion of particular VTDs in the contested districts is overwhelmingly predicted by its racial composition and is incorrect as he did not account for geographic distances in his analysis." Anything in any of the expert reports that change your mind on that?

A. No.

Q. Did you hear any testimony that changed your mind on that?

[782] A. No.

Q. And we can put that one down. And move to current times here. Defendant-Intervenors' Exhibit 101. Dr. Katz, can you tell us what that document is?

A. That's the supplemental report I wrote for this new trial.

Q. First, let me -- before we discuss your report, let me ask a timing question. How much time did you have to prepare this report?

A. A little less than two weeks.

Q. How does that compare with the timing you usually spend preparing an expert report?

A. Much, much shorter than typical.

Q. Have you -- what's normally the time you have to prepare a report?

A. It varies quite a bit. Normally at least a month, and typically several months.

Q And so in this report, you had approximately two weeks?

A. Just shy. I think it was 13 days.

Q. And did that, in ways, restrain your ability to do the report?

A. Yes.

Q. What were you asked to do here?

A. I guess the simple way to say it is I was asked to [783] review the new expert reports of Dr. Rodden and Dr. Palmer as it respected my findings.

Q. And let me ask the broad question. Do you see anything in -- I think this is actually asking the same questions again, and I won't do that too often, I hope. But was there anything in any of those reports that would cause you to revise your earlier report in any way?

A. No.

Q. Let's go page 1. Is this page -- the top of this page a summary of your findings?

A. It is.

Q. Can -- maybe -- and I know that the Court is interested in moving forward with it promptly. Let me just point -- let's just point to each one of these, and you can basically explain what the finding is in your first part of your summary here.

A. The first is some additional analysis of some state -- of statewide elections. I still find the elections are relatively polarized.

Q. Your second bullet point?

A. Dr. Palmer critiqued my analysis of inclusion of particular VTDs that is not overwhelmingly predicted by its racial composition based on flawed statistical reasoning. That is, I don't agree with his

findings -- his claims about weighting and/or distance measures.

[784] Q. And the third bullet point?

A. Dr. Palmer's analysis of the inclusion of particular census blocks in the contested districts based on its racial composition shares the same statistical flaws as Dr. Ansolabehere's analysis at the VTD level.

Q. And the last point is about compactness?

A. Right. The vast majority of my previous findings about compactness remain unchallenged in the reports of Dr. Palmer and Dr. Rodden.

Q. And could you determine how Dr. Rodden made any determinations when he talks about compactness in his report?

A. Again, it was an odd report from my perspective. I'm used to seeing expert reports that are based on statistical analyzes. This one didn't really present much in the way of quantitative evidence for its findings.

Q. So have you seen any report in any of the litigation you've been involved in -- am I correct you've been asked on many occasions to critique other experts' reports?

A. Yes. That's often my role.

Q. Yeah. And so have you ever critiqued a report that looks like this report?

A. In my personal experience, no.

Q. Okay. Let's move real quickly here. There's a section that has a numeral 1, Racially Polarized Voting. [785] What does this section do?

A. Again, it revises and revisits the racially polarized voting analysis that I had done in my original report, again, at the critique of Dr. Palmer that I hadn't looked at any statewide elections.

This is an issue -- clearly the House of Delegates elections are most important. The problem is that many of the House of Delegates elections in Virginia are not competitive. So that in general elections, there's no real contest. So we can't actually say how voters voted, particularly in the contested districts.

Q. And so is Table 1 and 2 and 3 your attempt to deal with that critique?

A. It is.

Q. And what do these three -- if you can just briefly tell the Court what these three tables show?

A. They are similar to what you saw in Dr. Palmer's report. They are examining ecological inference results; that is, estimates -- statistical estimates of the voting behavior of African-Americans and whites in three separate elections. The ecological -- the first one, Table 1, appearing on page 4 of the exhibit, is for the 2013 general election for Attorney General. On page 5 of the exhibit is labeled --

JUDGE PAYNE: You all must have a different [786] exhibit than I have. That Table 1 is on page 3 of mine and Table 2 is on page 4.

THE WITNESS: I'm sorry, Your Honor. I was actually going by the numbered page for the exhibit, not my numbering. It's my fault. My original report didn't number the title page.

JUDGE PAYNE: As long as we know the pages we're -- that you're referring to, that's -- you can continue to refer to the bottom way. Okay.

THE WITNESS: I thought it would be easier for the record if someone is looking back.

JUDGE PAYNE: Gotcha. Go ahead. Page 5. A Page 5 includes Table 2, which is the set of results for the Virginia general election for governor in 2013. And then Table 3 on page 6 of the exhibit, it is results for the 2013 primary election for Attorney General.

Q. In exactly -- the process of doing the ecological inference analysis, is that -- does that involve significant computing time and very significant sophistication of analysis?

A. It's a relatively sophisticated analysis. The computer time is decreasing every day with faster computers. I would say probably the first and -- first big block time-consuming part of it is actually getting [787] the data together.

Q. And am I correct to assume that getting the data together is almost an open-ended process? The more data you had, the better it would be?

A. Getting more data is always -- as a social scientist, we always like more data. But we're under time constraints to get things done. But yes, in general, that's true.

Q. And the constraints here were much greater than usual?

A. As I've already said, much tighter than usual.

Q. If we can go on to page 5, the heading of that section is Revising the Effects of Race and Party on the

Likelihood of Inclusion VTDs in the Challenged Districts. Can you just -- and there's a Table 4. Can you tell us what this section -- just briefly, tell us what this section does and what your analysis was?

A. Right. I told you, as I mentioned in my summary, Dr. Palmer critiqued my critique of Dr. Ansolabehere's model of predicting the inclusion of a VTD into a challenged district. And as you might recall from my earlier testimony, the central concern I had is these models that Dr. Ansolabehere used, and even the ones I use, assume a fair bit of independence. That's just a fancy way of saying I'm free to choose any VTD to put into [788] a district. And as I think we've heard through the testimony of people who draw maps, that's not really true. If I want to include, say, a district up here, I have to connect the dots. I have to create a bridge of VTDs, or census blocks, to allow it. So that's one nonindependence.

The second form of nonindependence is that we need the districts to be roughly equal sized. Well, this means that if I choose to include some VTD, say 101, making a number up, then I might not be able to include another VTD because the -- it's now at maximum population. It's at the top end of population deviation.

This creates nonindependence, which these models that we've all presented here and the analysis we've all presented here don't really allow it. As I noted in my initial trial -- my testimony in the original trial, I have some rudimentary attempts to try and fix this, but they are approximations at best.

The two critiques that Dr. Palmer makes of my analysis from that from the previous case is that one

about weighting and one about distance. And so perhaps we should take them rough -- shall I take them independently?

Q. Absolutely. Please explain to the Court the issue that you think is involved in measuring the districts -- distance to challenged districts?

[789] A. I was actually going to take weighting up first. We can do distance.

Q. Okay. I will ask you the question about weighting first.

A. So weighting -- again, this has come up repeatedly in Dr. Palmer's testimony. As we now know, these districts, these VTDs, are different sizes. So Dr. Palmer suggests that we need to weight them in our analysis. So he tried to explain to the Court why you weight, but let me see if I can take a similar stab at this, because weighting is actually a pretty simple idea.

Normally -- the central reason we weight is because we have some population that we'd like to know about; say the opinions of people in the Commonwealth of Virginia. So clearly I'm not going to go out and ask all the people in the Commonwealth. That's too costly. So I take some random sample. Say sample a thousand people. But I got unlucky. And suppose I know from census data that I got way too many women in my sample. That might skew the results as men and women have different opinions on the question I'm interested in.

Statisticians have no problem with that. We'll just reweight. We'll downweight the women and upweight the men's responses such they match the population.

And the hope, from the statistician's point of view, from the [790] quantitative social scientist's point of view, is that that weighting will adjust to make my sample look more representative of the population we're trying to make inferences about.

In this case, we have the entire population of VTDs. There's no population -- so my sample is perfectly representative because it's all of them. There seems no reason to weight since what I care about I observe all of. There's no worry that my sampling frame generated a mixture of too many big VTDs versus too many small VTDs.

So my analysis and long-winded way of showing, one, that that's an argument I make in this section and then show that what -- there actually are lots of weighting schemes one might use, and only the weighting scheme that weights by population, total population, in fact, leads to the finding that Dr. Palmer has. So it's not robust to the -- if you thought weighting was a good idea, which I don't, it's not robust to the choice of weighting scheme.

Q. And effectively, you used his -- what you think is the most -- you don't think it works anyway. But Table 4 basically is your -- Table 4, page 7 of your report?

A. Yes. It's replicating -- I forgot the table number in Dr. Palmer's report. It's different -- it's different specifications of his on -- using different weights.

Q. Let me ask a question. You were present in the room [791] for Dr. Palmer's cross-examination?

A. I was.

Q. And were you present for Ms. McKnight's discussing with him his Table 20?

A. I was.

Q. Let's go to Plaintiffs' Exhibit 71 and page 63?

A. I'm sorry. What was that exhibit number?

Q. The exhibit is Plaintiffs' Exhibit 71, page 63. Do you remember Ms. McKnight's question in regards to this in the context of -- of an analogy to vetting observations?

A. I do.

Q. And can you comment as to that factor, as to what's really important in making a determination as to whether a VTD is in a benchmark district or not?

A. Yes. So although all the effort at trial was spent on the first two rows, in fact, the biggest predictor; that is, the predictor that has the most -- that has the largest effect on whether or not a VTD is included in one of the challenged districts is whether or not it was the same -- in a challenged district in the previous benchmark plan. If I was only allowed one piece of information, that's the one piece of information I would want. So in that sense, it's the most predictive.

Q. And would that finding be consistent when someone is saying that the goal of their process was the status quo [792] or continuity?

A. That would generate that finding.

Q. Is there anything in Table 20 or any of your research that would contradict the notion that the goal of the program was continuity and status quo?

A. Again, I think we should be clear. All my -- the quantitative analysis that I do show that the indicator

for being in the previous -- being in a challenged district in the previous plan is the biggest predictor. And that's true across all specifications. You basically can't make that go away.

Q. And can we go to page 10? There's a section titled Implication of Using Census Block Level Data.

JUDGE PAYNE: Page 10 of what?

MR. BRADEN: Plaintiffs' -- in fact, let's skip over -- I won't suggest that we subject you to another regression and move over to page 12, Defendant-Intervenors' Exhibit 101. It's the section -- we'll go very briefly. We'll skip to page 13.

Q. And what does this section discuss?

A. This is just going back and briefly reviewing the compactness findings. As I note, nothing in Dr. Rodden or Dr. Palmer's report really challenge those claims. And I do highlight a few districts where Dr. Rodden makes claims about compactness that don't -- that are not consistent [793] with the quantitative estimates I provide in my original report.

Q. And you have not changed your view that these districts conform to general -- they do not appear to be outside the realm of traditional compactness for legislative districts, to the best of your knowledge?

A. Again, my analysis wasn't so broad. What I said in my original report is that the plan seems about as compact as the benchmark plan. So we should be clear on what I said.

Q. Yesterday Dr. Palmer testified that he used some of the same data that you used. Did you hear that?

A. I did.

Q. So in your opinion, can you, from this data, from your data, and the -- sort of the precision of your retrogression analysis or inference analysis, can your data support identifying a precise number between 50 and 55 black voting age population in which the legislature could have relied to assure that the plan would not -- your plan would not be retrogressive of the ability of the black community to elect candidates of its choice?

JUDGE PAYNE: Just a minute.

MS. KHANNA: I'm going to object to that question, Your Honor.

JUDGE PAYNE: What?

[794] MS. KHANNA: It's eliciting --

JUDGE PAYNE: I'm sorry. I didn't hear you.

MS. KHANNA: I'm going to object to that question. Counsel is eliciting testimony that is not included anywhere in the report.

MR. BRADEN: We've testified, I believe, before about the precision of the process. Basically we're asking him to talk about the precision of the process from Dr. Palmer's report. He happened to be present. We can remove the reference to testifying before, but he most certainly talks about the precision of the different processes in the data.

JUDGE PAYNE: Where does he do that?

MR. BRADEN: What, Your Honor?

JUDGE PAYNE: Where in his report does he do that? She says it's not in his report. As a general proposition, experts are confined to the topics that

they have in their report. They don't say the exact same thing. But where -- you told me it's in his report. Where is it?

MR. BRADEN: Your Honor, let me ask a couple questions of him and see if we can get to exactly where it is in the report.

JUDGE PAYNE: All right. If you need to object, get back up and alert us, if you will, please.

[795] Q. Okay. Do you discuss the precision -- is there anywhere in your data that -- I mean anywhere in your reports that -- where you comment on the precision of the various analyses?

MS. KHANNA: Objection, Your Honor. Vague. I'm not sure what the various analyses are. There are multiple analyses --

JUDGE PAYNE: Well, we're starting with that one. I don't think that's objectionable. Do you comment about the preciseness of any analyses in your report? Yes or no.

THE WITNESS: All of them.

JUDGE PAYNE: All right. So now the question is which ones do you comment upon? And the answer is all of them?

THE WITNESS: Yes.

JUDGE PAYNE: All right. Now -- so he's talking about all of them. Now, where we are going from there we don't know.

MS. KHANNA: Yes, Your Honor.

Q. And your various statistical analyses, many of them contain confidence levels?

A. Yes.

Q. And what do confidence levels indicate to you?

A. So confidence intervals are whenever you do a -- [796] estimate a statistical model or generate a statistical estimate, we don't know that for sure. If we did, you don't need me. So that model has uncertainty because we don't know things. We're making assumptions.

And so I and Dr. Palmer both include confidence intervals in our estimates, for example, of ecological estimates of voting behavior of African-Americans and white voters in various elections.

Q. So each one of your tables or your discussions that -- where you have confidence levels shows -- they exist simply to show that there is a degree of imprecision in your analysis?

A. Yes.

MR. BRADEN: Your Honor, I think that provides the basis for this question. He's absolutely indicated --

JUDGE PAYNE: Well, why don't you do this. Why don't you ask the question and then see if she has an objection to it, pointing to a particular imprecision to which you wish to direct the Court's attention.

Q. Based upon your reports and the confidence levels contained in them and your data and the precision of either regression analysis or ecological inference analysis, does your report -- does your data support identifying any precise number of black voting age population on which a legislative body could rely on [797] diminishing or increasing the black voting age population? In other words, can this report, in

your information, provide you with the magical number?

MS. KHANNA: Objection, Your Honor. It seems to me that counsel is asking the expert to draw a conclusion based on some analyses contained in his report. He had ample opportunity to provide those conclusions in his report. I think we just walked through them in bullet point fashion, and there is no conclusion about the ability or inability to provide a magic number, as Mr. Braden called it.

JUDGE PAYNE: So do you object to the form of the question?

MS. KHANNA: I do, Your Honor. I believe --

JUDGE PAYNE: Sustained. Maybe you'd like to try again. He said that there were measures -- he commented upon precision. Focus him on something and ask him. I think you're trying to do the whole thing up in one big ball, and that's her objection because there is no -- nothing in his report. She's not prepared to address it.

MR. BRADEN: Absolutely right, Your Honor. And I was just, to be brutally candid, trying to short-circuit the process.

JUDGE PAYNE: Well, nobody will fault you for [798] that but her, and she's entitled to have it done that way.

MS. KHANNA: Thank you.

BY MR. BRADEN:

Q. Can you explain what -- to the Court -- your report contains a number of confidence levels. Can you

explain to the Court how they limit the ability to use any of these analyses to make firm decisions?

A. Okay. So we actually --

MS. KHANNA: Objection, Your Honor. Again, I'm so sorry, but it seems that again he's asking for an analysis or a conclusion about what do the confidence intervals in his report mean, and those conclusions are already listed.

JUDGE PAYNE: That's a different objection, that they aren't disclosed, because now you've said they are disclosed. I don't -- I don't -- let me hear -- let us hear the answer to the question, and then if you want to move to strike, you can.

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: I think let's get a context and then we'll go from there. How about that? Can you answer the question?

THE WITNESS: Of course, Your Honor.

JUDGE PAYNE: Would you?

THE WITNESS: Yes.

[799] JUDGE PAYNE: Please.

A. So there's statistical uncertainty that comes about from our models. That was talked about in my report on these estimates, and that was talked about by Dr. Palmer. That means that we don't know precise numbers. We know ranges. And on some behavior, the ranges are quite large. There are other issues, but apparently I'm not to talk on them.

JUDGE PAYNE: So you agree with Dr. Palmer that the best you can do is come up with a range?

THE WITNESS: Yes. I don't agree with his range, but yes, I do.

JUDGE PAYNE: You don't agree with the range that he came up with?

THE WITNESS: It doesn't include all the sources of uncertainty in his model, but yes. To be honest, we didn't address this directly in my report. Only indirectly.

JUDGE PAYNE: All right. So that's about as far as we can go, then, I think, isn't it, Mr. --

MR. BRADEN: It sounds like that's as far as we can go, Your Honor. No further questions, Your Honor.

JUDGE PAYNE: Remember the constraint that you have. You can't go beyond direct unless you want to adopt him as your witness, which is a troublesome thing to do [800] for an expert.

MS. KHANNA: Well, I will say, Your Honor, I believe that this report has already been admitted into the record, and I think I'm allowed to cross-examine him not just on the upshot conclusions, but on the analyses that under lie them.

JUDGE PAYNE: Let's see where you go.

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: You still have a constraint.

MS. KHANNA: I understand that.

CROSS-EXAMINATION

BY MS. KHANNA:

Q. Good afternoon, Dr. Katz.

A. Good afternoon, Ms. Khanna.

Q. Prior to writing your supplemental report in this case, you never read the 2015 memorandum opinion issued by this Court; is that right?

A. That is correct.

Q. And you haven't read the 2017 Supreme Court opinion either; is that right?

A. That's correct.

Q. Is it fair to say that a majority of your supplemental report responds to Dr. Palmer's affirmative report?

A. That's accurate.

[801] Q. And you made the decision as to which portions of Dr. Palmer's report to respond to by looking at his analyses and addressing the things on which you disagreed with him; is that correct?

A. With the caveat it was also constrained by time constraints. So yes.

Q. You testified at your deposition that you chose those areas of his report on which you disagreed to analyze in your supplemental report. Do you recall that?

A. Yes.

Q. You provide no analysis regarding the racial compositions of populations moved in and out of the challenged districts; is that right?

A. Correct.

Q. Mr. Braden asked you on direct about your racially polarized voting analysis from your 2015 report, correct?

A. Yes.

Q. And you testified on direct that you concluded from that analysis that the challenged districts exhibit substantial racially polarized voting?

A. Yes.

Q. Now, your 2015 report, there you conducted an ecological inference analysis of House of Delegates elections in just seven House of Delegates districts; is that right?

[802] A. Yes. Those are the available ones that were contested over the last decade.

Q. You've provided no racially polarized voting analysis in any of the five remaining House of Delegates districts?

A. That is correct.

Q. And according to that 2015 analysis, you found evidence of racially polarized voting in three out of the seven districts you chose to analyze; is that right?

A. Yes.

Q. And one of those districts was District 75; is that right?

A. I believe a that's correct.

Q. So taking District 75 off the table, is it fair to say that your 2015 analysis found evidence of racially polarized voting in two of the remaining 11 challenged districts?

A. That sounds correct.

Q. In your 2015 report, you testified, and I believe you just testified on direct, that elections for seats in the Virginia House of Delegates are the only ones relevant to the question of racial polarization. Do you recall that?

A. Yes.

Q. And you criticized Dr. Ansolabehere for examining statewide elections in the course of his racially polarized voting analysis?

[803] A. That is correct.

Q. And in that report, you noted that Dr. Ansolabehere had failed to demonstrate a relationship between statewide elections and House of Delegates elections. Do you recall that?

A. I do.

Q. Can you please turn to page 2 of your supplemental report? That's Defendant-Intervenors' Exhibit 101.

A. Just to get the numbering correct, is it the number of exhibit or my numbering of pages?

Q. I'm using the exhibit numbering as well.

JUDGE PAYNE: So page what of the exhibit.

MS. KHANNA: Exhibit 101, page 2.

JUDGE PAYNE: Page 2. That's where the bullet points are?

MS. KHANNA: That's right.

Q. Here you note that the House of Delegates elections do, however, present a challenge. Do you see that?

A. I do.

Q. And that challenge is that few of these elections are truly competitive, which makes it difficult to gauge meaningful differences in voter preferences. Did I read that correctly?

A That is correct.

Q. In no point in your 2015 report did you explain that [804] the fact that the House of Delegates elections are often uncontested presents a challenge that makes it difficult to gauge meaningful differences in voting preferences; is that correct?

A. Again, I did note that we could only analyze contested elections in my previous report.

Q. The answer to my question is?

A. Is no.

Q. At no point in your 2015 report did you explain that the fact of House of Delegates -- that House of Delegates elections are often uncontested presents a challenge that makes it difficult to gauge meaningful differences in voter preferences?

A. I'm reasonably sure, but I don't have the exact page, that I did mention that we can only analyze contested elections.

Q. You mentioned that you could only analyze 7 out of 11 districts, according to your preferred technique; is that right?

A. Correct.

Q. You never mentioned that it would be difficult to gauge meaningful differences in voter preferences based on that analysis?

A. I was not as clear, correct.

Q. Now, in your 2017 supplemental report, you provide a [805] racially polarized voting analysis using three statewide elections; is that right?

A. That's correct.

Q. And those three statewide elections were the 2013 gubernatorial election, the 2013 Attorney

General election and the 2013 democratic primary for Attorney General, correct?

A. That is correct.

Q. You chose to look at general elections for governor and Attorney General because those were the most recent statewide elections for which we could easily gather data?

A. That's correct.

Q. I'm quoting your testimony there; is that right?

A. That is absolutely correct.

Q. Okay. And you chose to look at the democratic primary for Attorney General because neither of the two statewide elections included a candidate who is African-American?

A. Also correct.

Q. But the governors and the Attorney General races were not only the statewide elections to took place in Virginia in 2013, were they?

A. I'm sure not.

Q. There were, in fact, three statewide elections that took place that year, the third being for Lieutenant [806] Governor?

A. Yes.

Q. You never examined that election?

A. I did not.

Q. And that Lieutenant Governor's race did, in fact, include an African-American candidate?

A. I didn't know that.

Q. You didn't inquire about that election at all in

preparing your supplemental report?

A. I did not.

Q. Is it fair to say that the map drawers of HB 5005 would not have had access to the information about any of the three elections you chose to analyze in your supplemental report?

A. That's for sure.

Q. And that's because all of those statewide elections took place after the 2011 map drawing process?

A. That is correct.

Q. And Dr. Hood's 2017 report analyzes the same three elections that you analyzed in your report; is that right?

A. I didn't know. I've never read Dr. Hood's report.

JUDGE PAYNE: Nor was he asked about it on direct.

MS. KHANNA: Thank you, Your Honor.

Q. Dr. Katz, you would agree that the manner in which [807] the data is collected or merged can have an effect on the accuracy of the resulting analysis, wouldn't you?

A. In general, of course.

Q. You received all of your data for your racially polarized voting analysis from an individual named Clark Bensen; is that right?

A. That is correct.

Q. Clark Bensen is a long-time consultant to republican entities; is that right?

A. And academics, yes.

Q. It's a former employee of the Republican National Committee?

A. I don't know his work history. I'm sorry.

Q Is it fair to say that Clark Bensen had a role in deciding what specific elections and what specific districts to analyze in your 2017 report?

A. Yes. As I mentioned in deposition, Clark and I had numerous conversations about what data he was able to get on short notice.

Q. You only had a vague awareness of how Clark Bensen originally collected the data; is that right?

A. Can you be a little more specific because that seems very broad? I know -- I've worked with Mr. Bensen on many cases and some research examples. So I know in general how he works quite specifically.

[808] Q. Did you have any awareness of how he collected the data used in your report?

A. Again, in general terms, yes. The specifics in this case, no.

Q. Do you recall testifying during your deposition that you were aware of -- when I asked you, Are you aware how Clark Bensen originally collected the data, you replied, Only in the most vague terms. Do you recall that?

A. Yes.

Q. And the same is true for how Clark Bensen merged the data; you only have a vague awareness of how he combined census data with precinct level data here; is that right?

A. Yes. I would probably have preferred to use the word general, but yes. That was my original testimony in deposition.

Q. You didn't inquire into his data sources here, did you?

A. In particular, no.

Q. In preparing your supplemental report, neither you nor your research assistants independently gathered any data from the Virginia Department of Elections; is that right?

A. That's right.

Q. You relied solely on Mr. Bensen?

A. That is correct.

[809] Q. Now, your 2017 report examines racially polarized voting in four House of Delegates districts; is that right?

A. Yes.

Q. And those four districts are District 69, 70, 71 and 89?

A. Correct.

Q. You do not provide a district-specific racially polarized voting analysis of any other challenged districts?

A. That is correct.

Q. Okay. Let's take a look at that analysis for the four districts you analyzed. And I'm referring specifically to your Table 2, which is Defendant-Intervenors' Exhibit 101, page 5. Do you have that in front of you?

A. I do.

Q Thanks. Dr. Katz, isn't it a fact that based on your Table 2 in all four districts in which you chose to perform a district-level racially polarized voting analysis, your analysis indicates no racially polarized voting in the 2013 governor's election?

A. In those four districts, that's correct.

Q. Please turn to the previous page, Table 1. Isn't it a fact that based on your Table 1, three of the four [810] districts in which you chose to perform a district-level racially polarized voting analysis indicate no racially polarized voting in the 2013 Attorney General election?

A. Also correct.

Q. The only exception is District 70 in Table 1?

A. Correct.

Q. And there you have a point estimate that does indicate a majority of whites are voting for the black preferred candidate; is that right?

A. Yes.

Q. But the confidence interval falls below 50 percent?

A. That is correct.

Q. And, therefore, in this district, you can draw no conclusions about the existence of racially polarized voting?

A. Correct.

Q. Now, Dr. Katz, in each of your tables that we've just looked at, you report confidence intervals with each of your ecological inference estimates; is that right?

A. That is true.

Q. Those are the numbers in the parentheses below each point estimate?

A. Yes.

Q. A confidence interval a is measure of statistical uncertainty about an estimate?

[811] A. Yes.

Q. You would agree, wouldn't you, that the measure of uncertainty is critical to any statistical analysis?

A. Yes, I would.

Q. And it's important with respect to any conclusions you can draw from that statistical analysis?

A. Yes.

Q. And you've never reported ecological inference estimates alone without confidence intervals in any of your expert testimony in any legal case; is that right?

A. That's true.

Q. Or in any academic work?

A. That's definitely work.

Q. Because it is standard practical in political science, when presenting model estimates, to provide some estimator of statistical uncertainty?

A. That is true.

Q. Now, in Tables 1 and 2, you also performed a racially polarized voting analysis of several regions as well; is that right?

A That is correct.

Q. And you relied on Clark Bensen to determine what areas were included in each region?

A. That's no. We had a long discussion about this at my deposition. It was a discussion between myself and Clark [812] Bensen about regions.

MS. KHANNA: Can you please put up Dr. Katz's 2017 deposition starting on page 109, line 24? It will go on to the next page.

Q. Do you see where I asked, "These counties and independent cities that define the regions that you looked at, do they include suburban areas that are outside of the challenged districts?" And you responded, "Again, I don't know. The county data was provided to me as is. I don't know the geography of Virginia that well to tell you what was and not included."

MS. KHANNA: And go to the next question, too.

Q. And I said, "You relied on Clark Bensen to make that determination," and your response is "yes"?

A. Yes. To which exact regions were included, yes. The yes is specific to that previous question.

Q. My question today was you relied on Clark Bensen to determine what areas were included in each region?

A. Oh, sorry. Then I apologize for making this elongated. I just misheard your question.

Q. So the answer to my question is, yes, you relied on Clark Bensen for that information?

A. For the exact region, the exact VTDs to include, yes.

Q. The exact counties to include, in fact?

A. The exact counties to include, yes.

[813] Q And you didn't do any analysis to determine how much of these regions were actually included in the challenged districts in the benchmark map; is that right?

A. I did not.

Q. Or any analysis to determine how much of these regions are actually included in the challenged districts under the enacted map?

A. That is also true.

Q. You would agree, wouldn't you, that a district-specific racially polarized voting analysis is important to the issues of racial voting patterns in the challenged districts?

A. Yes.

Q. And all things being equal, you would prefer a district-specific racially polarized voting analysis to a regional polarized voting analysis?

A. Yes.

Q. Dr. Katz, would you agree that based on your Table 1 in your supplemental report, the level of racially polarized voting varies throughout the Richmond region as you define it?

A. Yes.

Q. And the same goes for Table 2 in your supplemental report?

A. Yes.

[814] Q. And you would agree that based on Table 1 of your supplemental report, the level of racially polarized voting that you find in the Richmond region

generally is higher than the level of racially polarized voting you find in any of the four challenged districts that you choose to analyze?

A. That would be correct.

Q. And the same is true for Table 2?

A. Yes.

Q. You also examined the 2013 democratic primary for Attorney General; is that right?

A. That is correct.

Q. And that analysis is presented on Table 3 of your supplemental report, Defendant-Intervenors' Exhibit 101, page 6?

A. Yes.

Q. And, again, because this was a 2013 primary, the map drawers would not have had access to data or information about this particular election in 2011?

A. That's very true.

Q. And you stated that you chose to examine that election because it was a race between a black candidate and a white candidate, right?

A. Correct.

Q. And not because it was a primary?

[815] A. Not in particular.

Q. The answer to that is no?

A. Yes.

Q. In fact, you would have preferred for it not to have been a primary?

A. I would have preferred for it to be a House of Delegates election.

Q. The answer to my question?

A. Yes.

Q. You would have preferred for it not to have been a primary?

A. Yes.

Q. You would have preferred to analyze a general election between a black candidate and a white candidate?

A. That would be correct.

Q. And you did not analyze any House of Delegates democratic primaries for any of the challenged districts; is that right?

A. That is correct.

Q. Not in your 2015 report?

A. No.

Q. And not in your 2017 report?

A. No.

Q. And you did not even look into whether there were any contested democratic primaries in any of the challenged [816] districts?

A. That is correct.

Q. That is because your preference is to examine general elections?

A. As a first cut, yes.

Q. Okay. So based on your analysis of the 2013 democratic primary for Attorney General, you conclude in your supplemental report that African-Americans overwhelmingly preferred Justin Fairfax while white voters, for the most part, preferred Mark Herring; is that right?

A. Yes.

Q. I want to take a look at confidence intervals for the white share of the vote for Justin Fairfax. Is it fair to say that the vast majority of the confidence intervals straddle the 50 percent mark?

A. Yes.

Q. And this means that in those cases, you cannot statistically discern which candidate a majority of whites actually preferred?

A. That is correct.

Q. And, in fact, in at least six instances in Table 3, your point estimate for the white share of the vote for the black preferred candidate is accompanied by a confidence interval between zero and 1? [817]

A. Also true.

Q. And that's true for District 69?

A. Yes.

Q. And that means that all you can say about the white share of the vote for Justin Fairfax is that it fell somewhere between zero and 100 percent?

A. Correct.

Q. And in House District 70, all you can say about the white share of the vote for Fairfax is that it fell somewhere between 35 percent and 100 percent?

A. Correct.

Q. And in District 71, it ranges from between 19 percent to 63 percent?

A. Correct.

Q. You did not analyze any other statewide democratic primary since 2001 that included an African-American candidate; is that right?

A. I did not.

Q. You did not analyze the 2008 democratic primary for president; is that right?

A. I did not.

Q. You would agree that this is an example of a democratic primary involving a black and white candidate?

A. Yes. And many others.

Q. And many other candidates?

[818] A. Yes.

Q. And this is a primary that took place before the 2011 redistricting process?

A. Yes.

Q. And therefore, map drawers would have had access to this information when actually drawing the map?

A. In principle, yes.

JUDGE PAYNE: I know we're doing a lot about the 2013 figures in his report. I have been at a loss from the very beginning what they have to do with what we're doing here at all and why we're spending so much time on it. I'm not criticizing your examination, but I -- is there some -- it's being offered just to show methodology. Is that all it's being offered to show?

MS. KHANNA: I believe it's being offered to show the existence of racially polarized voting for

defendants' narrow tailoring burden, which was to show that the map drawers had a strong basis in evidence for drawing the districts the way they did.

JUDGE PAYNE: Well, what's 2013's findings have with respect to -- I mean, if we did that, we would be using post hoc evidence, and I think the Supreme Court might give us a little smack.

MS. KHANNA: Your Honor, Dr. Katz and Dr. Hood both chose to 2013 elections in their analyses. So I'm [819] merely questioning him on his elections that he chose for his --

JUDGE KEENAN: Are you maintaining that it's relevant to what we have in front of us today?

MS. KHANNA: I'm not saying it is relevant or irrelevant. I'm not -- I haven't made an objection on relevance at this point. But I do think that it --

JUDGE KEENAN: I don't mean to cut you off, but tell us what -- why -- I've got the exact same problem that Judge Payne has. Why are we hearing it? I mean, we've got so much information to sift through, and if something occurred over two years after the plan drawers were making their significant decisions, what does it show?

MS. KHANNA: Well, I would agree that if the Court is inclined to decide that the racially polarized analyses providing by the defendant-intervenors' experts based on 2013 elections is not relevant to the analysis and not relevant to the narrow tailoring burden here, I would -- I'll move on.

JUDGE PAYNE: Well, you all didn't object. I guess the thing that troubled me when I read it, and I'm having the same trouble today, I didn't hear

anybody stand up and say, hey, why are we doing this and none of this ought to come in. So I assumed you all thought it was [820] relevant, and I felt really kind of out of the loop. And then -- and actually, intellectually challenged because I didn't follow. Now I'm beginning to understand.

MS. KHANNA: Well, to be clear, Your Honor --

JUDGE PAYNE: So you're finished, about. Are you?

MS. KHANNA: Well, I guess we didn't really have an opportunity to object to the relevance of a portion of the analysis in his expert report. We only had the ability to cross-examine him on the reliability of his expert report.

JUDGE PAYNE: Huh-uh. You stand up and say that whole topic is irrelevant. That's what happens when you got experts testifying and you're in the short fuse you're on. You had the chance, or you could have moved in limine to stop it. You knew what the testimony was. So it could have been done.

MS. KHANNA: I'm --

JUDGE PAYNE: How much more do you have so we can figure out of what we're going to do and then you all can tailor the next cross-examination, because they have other witnesses to go and you're already beyond the length of direct.

MS. KHANNA: I agree, Your Honor. I'm going to move on to analyzing other parts of his analysis.

[821] JUDGE PAYNE: How long are you going move on?

MS. KHANNA: I don't think I have more than ten minutes, Your Honor.

JUDGE PAYNE: How are you doing over there, Ms. Stroh?

THE WITNESS: My preference would be to push through, but --

JUDGE PAYNE: I'm talking to the court reporter.

THE WITNESS: Oh, I'm sorry.

JUDGE PAYNE: She's the most important person in the courtroom.

THE WITNESS: By far.

JUDGE PAYNE: And they're changing. So is this a good time to take a break?

THE COURT REPOTER: Let's just finish.

JUDGE PAYNE: All right. We're going to finish. Now the pressure is on.

Q. Dr. Katz, you would agree that demographic characteristics vary among the challenged districts, would you not?

A. You mean the racial composition of the -- racial and economic compositions of the districts?

Q. The demographic characteristics. However, you would understand that.

A. Yes.

[822] Q. And you would also agree that voting patterns vary across the challenged districts?

A. Yes.

Q. You would agree that political performance varies across the challenged districts?

A. That's a little vague for me to agree to.

Performance of what?

Q. Well, the political performance of each district varies from one district to another?

A. Performance means some goal. So you have to tell me what the goal you're measuring performance by.

Q. Do you believe that they vote in different numbers for different candidates?

A. Yes.

Q. You would agree that the higher the level of racially polarized voting, the more likely you're going to need a larger number of black voting age population in order to afford black voters an opportunity to elect their preferred candidates?

A. Yes.

Q. And by the same token, if there is a lesser degree of racially polarizing voting, then you're not going to need as high a black voting age population to afford black voters an opportunity to elect their preferred candidates?

A. Yes.

[823] Q You would agree, wouldn't you, that the level of racially polarized voting varies among the challenged districts?

A. With a qualification, in the districts for which we can estimate it.

Q. Isn't it a fact, Dr. Katz, that at no point in your supplemental report do you draw any conclusions about the necessity of the 55 percent BVAP floor in

order to afford black voters an opportunity to elect their preferred candidates?

A. I actually do in my original 2015 report.

Q. I asked you about your 2017 supplemental report. And the answer there is?

A. No.

Q. I want to move on briefly to your discussion of the race versus party analysis in predicting VTD inclusion in the challenged districts. In your original 2015 analysis, you found there to be a statistical tie between race and party in terms of what better predicts VTD inclusion in the challenged districts; is that right?

A. Correct.

Q. I take it that was not based on any of the testimony that we've heard from Mr. Morgan or Mr. Jones or Delegate Jones about why VTDs may or may not have been included?

A. Yes.

[824] Q. And you didn't find at that time that party is a more significant predictor than race in terms of VTD inclusion; is that right?

A. Again, to be clear, they were a statistical tie in their predictive abilities in this limited analysis.

JUDGE PAYNE: Can you pull that mic up? I'm having a little trouble hearing you.

THE WITNESS: I'm sorry, Your Honor.

A. They were a statistical tie in terms of their predictive power in this limited analysis that I was redoing of Dr. Ansolabehere.

Q. You heard Dr. Palmer testify yesterday that one of the main differences between your model and Dr. Ansolabehere's model was this issue of population weights; is that right?

A. Yes.

Q. And you never mentioned that distance -- that difference regarding weighting VTDs by population in your 2015 report; is that right?

A. Because, actually, it wasn't clear that Dr. Ansolabehere had weighted his. But I honestly don't recall, from two years ago, the exact reasoning.

Q. But it was not in your report, right?

A. It was not in my report.

Q. And you indicate in your 2017 report for the first [825] time that Dr. Ansolabehere's method of population weighting was incorrect; is that right?

A. I did because Dr. Palmer raised it as a critique of my analyses.

Q. You never raised it as a critique of Dr. Ansolabehere's analysis?

A. No.

Q. So under your preferred model, a VTD with 10 people; that is, 50 percent BVAP, would be just as likely to be included in a given challenged district as a VTD with 1000 people that is also 50 percent BVAP?

A. Given the simple model, that is the finding.

Q. You also discussed on your direct examination the inclusion of a distance measure in your race versus party analysis; is that right?

A That's correct.

Q. And on page 10 of Defendant-Intervenors' Exhibit 101, in the middle of the page here, you say that one reasonable approach to the distance measure question is to include information detailing both the average distance from the VTD to the set of challenged districts and the variation in those districts; is that right?

A. With an important qualifier; might.

Q. You refer to this as a reasonable approach that might include this information; is that right?

[826] A. That's correct.

Q. And that approach is reflected into your own Table 6 on the following page?

A. Again, much like with the distance measures -- with the weighting, we --

Q. Sorry. Just wanted to make clear. I'm under a very limited constraint. That approach that you reference here is in Table 6 of your supplemental report?

A. It is.

Q. Can you please turn to Table 6 on page 11?

A. I have it.

Q. Here you present five specifications for your model, one with Dr. Palmer's preferred distance measure and then four other distance measures; is that right?

A. That is correct.

Q. And none of these are weighted by population; is that right?

A. That is correct.

Q. None of these are weighted in any way?

A. Correct.

Q. Now, the BVAP coefficient is larger than the democratic vote share coefficient in each of the models in your Table 6; is that right?

A. Yes.

Q. And you performed no analysis of the statistical [827] significance of the difference between the BVAP coefficient and the average democratic vote share coefficient for any of these models?

A. As we did in my deposition, all that information is contained within that table.

Q. I walked you through it in your description, but you provide no conclusions to that effect in your report; is that right?

JUDGE PAYNE: Now, wait a minute. Let's don't -- don't be arguing with the witness.

BY MS. KHANNA:

Q. You provided no conclusions to that effect in your report?

A. Correct.

Q. And would agree, wouldn't you, that what is really important here, for purposes of this analysis, is the difference between the coefficient for BVAP and the coefficient for democratic vote share?

A. I think that is an issue. I don't, actually, think that's the most important issue.

Q. My question was you would agree that it is really important here, for the purposes of this

analysis, is the difference between the BVAP coefficient and the defendant vote share coefficient.

A. It is "an" important.

[828] Q. You would agree with my statement?

JUDGE PAYNE: He's not quibbling with your answer. You're kind of quibbling with his. So I think let's -- you're getting close to how many angels can stand on the head of a pin.

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: We don't need to --

Q. Isn't it a fact that in each of your modules in Table 6, the BVAP coefficient is larger than the democratic vote share coefficient?

A.. Yes.

Q And isn't it a fact that in each of the models in your Table 6, the difference between those two coefficients is statistically significant?

A. Yes.

Q. And so in each of the models in your Table 6, race is more predictive than party of VTD assignment in the challenged districts?

A. Correct.

Q. And that difference is statistically significant?

A. Yes.

Q. One last issue. Dr. Katz, you include a section of your 2017 report entitled Implications of Using Census Block Level Data, and that's on page 11 of Exhibit 101; is that right?

[829] A. That's correct.

Q. And here you dispute Dr. Palmer's assertion that census blocks do not contain political information as absolutely incorrect; is that right?

A. That is true.

Q. And that is because race data is available at the census block level and race is highly correlated with party identification?

A. As is other demographic data, but yes.

Q. What other demographic data?

A. At the census block data, you can set statements about education levels, about average income levels.

Q. The census block data level provides that?

JUDGE PAYNE: Excuse me a minute. Pull that mic up or sit up, please.

THE WITNESS: I'm sorry, Your Honor.

A. Yes. You can get census block data on income and age -- and education levels.

Q. The U.S. Census Bureau collects census data on income -- what was the other variables that you mentioned?

A. Education.

Q. Education. Anything else?

A. There's many. I don't know all of them off the top of my head.

MS. KHANNA: Your Honor, I'd like to offer and [830] introduce an exhibit, 91, as an impeachment exhibit. Copies for the Court.

JUDGE PAYNE: You generally don't introduce impeachment exhibits. You wait until after you finish

and see what you've scored or not scored, and then if there's a need for it, it's considered for admission at this time.

MS. KHANNA: Thank you, Your Honor. I'll just identify it.

JUDGE PAYNE: The whole purpose is for impeachment. It has no substantive value --

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: -- probative value other than that. All right.

MS. KHANNA: Sorry. I think this is actually a two-page exhibit. So it might not have been --

JUDGE PAYNE: Do you have two pages, Dr. Katz?

THE WITNESS: I have one page.

JUDGE PAYNE: You have one page that you can't read?

THE WITNESS: Yes. Correct. I have one page that seems to have two documents on if. Is that correct?

JUDGE PAYNE: Can you read them?

THE WITNESS: Barely.

JUDGE PAYNE: I can't do very well with mine. Do you have any big version of this?

[831] MS. KHANNA: I don't, Your Honor, but I believe it's up on the screen.

JUDGE PAYNE: Well, I can tell you that that doesn't do me any good either. I'm sure even if I'm close to the screen, I can't see that.

JUDGE KEENAN: I can't see that.

JUDGE PAYNE: Okay. We can't tell anything from this. So -- I can't -- we can't use this. Ask him your questions and see. But if he can't read it, he doesn't have to use it to answer. That's not fair.

MS. KHANNA: Okay.

Q. Dr. Katz, could you identify this as a sample 2010 census form that would be produced by the U.S. Census Bureau?

A. The short form, yes.

Q. The short form?

A. Yes.

Q. Is there a longer form that you're aware of that's provided in the decennial census?

A. Yes. Households are randomly selected to receive short or long forms.

Q. I believe -- are you thinking of the 2010 census or any time period before that, because is it your understanding that the American Community Survey Data has replaced the long form census?

[832]

A. Oh, that's right. I forgot the change. My apologies. I forgot the change in 2010. Correct.

Q. Dr. Katz, you just testified that other census data, such as education and income, is available at the census block level; is that correct?

A. Only from the ACS. Sorry. My apologies.

JUDGE PAYNE: Only from what?

THE WITNESS: Only from the American Community Survey.

JUDGE PAYNE: Okay.

A. Which is not part of the official census.

Q. And the American Community Survey is not reported at the census block level, is it?

A. No. It's reported at the census track level.

Q. So the question I asked you is whether Dr. Palmer's foundational assumption that there is no political data available at the census block level was wrong. And that's because race data is available at the census block level and race data is highly correlated with party identification; is that right?

A. And voting behavior. Yes.

Q. And voting behavior?

A. Yes.

Q. Race data is highly correlated with voting behavior and party identification?

[833] A. Correct.

Q. So according to your report, political information could be gleaned from the race data?

A. Yes.

MS. KHANNA: Thank you, Dr. Katz. I have no further questions.

JUDGE PAYNE: All right. Is there any redirect?

REDIRECT EXAMINATION

BY MR. BRADEN:

Q. On how many cases have you worked with Clark Bensen where he helped you prepare data?

A. At least a dozen. Probably more.

Q. And has he helped you on your academic research at various times?

A. He has. He's probably the best data person I know.

Q. Does the inability to show racial polarization because of confidence levels being too large prove the reverse; that it doesn't exist?

A. No.

Q. So if one had the burden to prove to a court or DOJ that racial polarization did not exist, the confidence levels were such that you wouldn't be able to make that assertion?

A. I'm a little uncomfortable. That's sounding dangerously close like a legal -- asking me a legal [834] question, and I try very hard not to make legal statements since I'm not a lawyer.

Q. Okay. Would you be able to make the determination on whether or not -- if you had an obligation to come into a courtroom and testify affirmatively that it did not exist, would you be able to do it?

A. No.

MR. BRADEN: Thank you.

JUDGE PAYNE: On page -- in Exhibit 101, page 10, you make the statement, "In the U.S., and especially in Virginia, race data is very highly correlated with party identification." And you cite three -- three references there. "And numerous recent works present evidence of this correlation within the state of Virginia," citing more. And then you added to that at your last testimony "after party identification and voting behavior." Is that your opinion -- is that still your opinion, notwithstanding what she asked

you about what was in the -- in the voting -- in the census questionnaire?

THE WITNESS: Yes. I mean, if you look at all the ecological -- the analyses that I presented or Dr. Palmer presented, African-Americans are voting overwhelmingly for democratic candidates. We know that.

JUDGE PAYNE: But that is in Virginia specifically?

[835] THE WITNESS: That's in Virginia specifically. But that's true -- that's also true in other locations where there are sizable African-American populations.

JUDGE PAYNE: Anybody have any questions based on what I asked or does the Court have any other questions? We'll take a 20-minute recess. Can he be excused?

MR. BRADEN: Yes, Your Honor.

JUDGE PAYNE: Thank you for being with us. I know you got a plane to catch from the look on your face.

THE WITNESS: You are correct, Your Honor.

(Recess taken.)

[836]

JUDGE PAYNE: Next witness is?

MR. RAILE: Your Honor, defendant-intervenors call Dr. M. V. Hood.

JUDGE PAYNE: Thank you.

M. V. HOOD, III,

a witness, called at the instance of the defendant-intervenors, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RAILE:

Q. Dr. Hood, would you state your name for the record.

A. M. V. Hood, III.

Q. And, Dr. Hood, you are an expert retained by defendant-intervenors in this case; is that correct?

A. Correct.

Q. And you testified in this case previously; correct?

A. Correct.

Q. And that was in 2015?

A. Correct.

Q. And you filed a report previously in this case; is that correct?

A. Correct.

Q. And do you have it, that report, in the witness binder in front of you? It should be the first tab.

[837] A. Yes, I do.

Q. That's Defendant-Intervenors' Exhibit 15; is that correct?

A. That's correct.

Q. And we are not going to go through this report, but I just wanted to ask you, has anything that you have seen in the other expert reports or any of the

testimony that you have heard, either in 2015 or since, changed your views as expressed in that report?

A. No.

Q. Okay.

JUDGE PAYNE: Is the same true for the testimony you gave at trial?

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: That is, it hasn't changed what you testified to at trial?

THE WITNESS: That's correct, Your Honor.

Q. So you filed a supplemental report in this case in 2017; correct?

A. That's correct.

Q. And is that report in front of you as well?

A. Yes.

Q. What were you asked to do in this report?

A. I was asked to do two primary things, and one of them was to provide a sociodemographic comparison between the challenged districts and the remaining House of Delegates districts, and [838] the second was to perform my own racial block voting analyses in response to Professor Palmer's report.

Q. And where is the -- your analysis, the first analysis you described, the demographic analysis in your report?

A. Pages three and four.

Q. And --

JUDGE PAYNE: Are you using, Dr. Hood, the pages at the bottom of the page in bold type or the pages of your pagination system?

THE WITNESS: I'll use whichever pages you'd like, Your Honor.

JUDGE PAYNE: You choose.

THE WITNESS: I'll use my page numbers.

JUDGE PAYNE: That is page what of your numbers?

THE WITNESS: Three and four, Your Honor.

Q. And could you describe very briefly what it was, the analysis that you performed in this section.

A. Okay. As briefly as I can, I collected census data on various sociodemographic factors listed in table one, and I provided a comparison on these factors between the challenged districts as a group and the remaining House of Delegates districts.

Q. And what was the purpose of that comparison?

A. To see if these districts were similar or alike on other factors besides racial component -- racial composition, excuse [839] me.

Q. Are these factors that experts in your field and you, yourself, use for their day job in their academic research?

A. Yes.

Q. What was your conclusion in this section?

A. In a nutshell, my conclusion is that the challenged districts are much more alike compared to the remaining House of Delegates districts on these factors.

Q. And the Court can go in and read the details. I think it's pretty self-explanatory.

JUDGE PAYNE: Excuse me a minute, Mr. Raile, so I don't get caught with my foot off base again. This table looks like it's 2015 data, and I'm not quite sure why 2015 data is helpful here, what its purpose is for. Ms. Khanna said that she thought it was for narrow tailoring, these kinds of data, but I don't know what we're doing here. Can you kind of get us in the picture before we get too far down the road again?

MR. RAILE: Would you like me to offer an explanation, or --

JUDGE PAYNE: I want to know from you why you're offering it, and then if you want to put some preliminary testimony on to augment your point so we can understand and get the context, that would be all right, too.

MR. RAILE: Sure. Our understanding of the narrow tailoring inquiry, Your Honor, is that it is distinct from the [840] predominance inquiry insofar as the principle concern of the predominance, and I guess the only concern is motive. And that's subjective intent.

And in the narrow tailoring inquiry, we are -- I think the Supreme Court's opinion actually allows for more consideration which -- strong basis in evidence. We're interested in what does strong mean, for instance, and that may involve information that bears out to tend to help, add credence to what the map-drawer's decision was in the past.

JUDGE KEENAN: It wasn't in existence in 2011, this table; right?

MR. RAILE: Correct.

JUDGE KEENAN: The data on which it is -- or from which it is drawn didn't exist as well, did it?

MR. RAILE: No, Your Honor.

JUDGE PAYNE: Whence cometh this data, and what timeframe --

MR. RAILE: This is --

JUDGE KEENAN: Add one more thing so you can answer fully. It seems to me that the question of narrow tailoring comes down to what information did they have in front of them at the time they were drawing the map that indicated that this was necessary to elect a candidate of their choice.

And so if there's demographic information four years later, how does that bear on the question of whether they had [841] information then available to them that was necessary to do what they did to elect a candidate of their choice.

MR. RAILE: I question the premise, Your Honor, because in the Supreme Court's decision, it listed a variety of evidence that it considered pertinent, and one of the evidence was the racial block voting analysis provided by the plaintiffs. It actually said the plaintiffs' numbers show that there's racially polarized voting in House District 75, and if you look at plaintiffs' 2015 expert report, it includes at least one election from 2013.

JUDGE PAYNE: Does that make it any more admissible because they put their foot outside the line and hit a foul ball?

MR. RAILE: I'm sorry, I don't understand the question, Your Honor.

JUDGE PAYNE: If they're wrong, how does that make -- does that help your case?

MR. RAILE: The Court actually said that the plaintiffs' own numbers support the state's case, because the plaintiffs' number --

THE COURT: You mean the Supreme Court.

MR. RAILE: Yes, including the --

JUDGE KEENAN: Could you direct us to the part of the Supreme Court opinion?

MR. RAILE: I would love to, Your Honor, if I had the [842] opinion in front of me. I didn't come prepa ed to discuss --

MR. HAMILTON: I'm happy to provide counsel with a copy of the opinion.

MR. RAILE: Thank you. I appreciate it.

JUDGE PAYNE: But the plaintiffs didn't object to any of this, so I don't understand. Were they laying in the weeds, or what are you doing back there? You're going to have to answer this, too, in a minute, Mr. Hamilton. All this stuff is in the record now. It's unobjected-to evidence that's in the record, and I just need -- I think we need an understanding of why something that has -- that is prepared in 2015 and reflects data after 2011 and wasn't, apparently, considered by the people who drew the maps or voted on the plan is something that we can consider without running afoul of the post hoc justification component of the Supreme Court's opinion.

JUDGE KEENAN: And the Supreme Court specifically says the question is whether the state had good reasons to believe that a 55 percent BVAP floor

was necessary to avoid liability under Section 5. And then this is in conducting the analysis of Section 5 --

MR. RAILE: Then it goes on to say --

JUDGE KEENAN: Then it goes on to say the state did have good reasons under these circumstances, and so the Supreme Court was looking at a freeze frame in time, was it not, of what the state knew at the time the state took this action?

[843] MR. RAILE: Well, I mean, I read it a little differently. I think it goes on to say the challengers, moreover, over do not dispute that District 75 was an ability-to-elect district or that white and black voters in the area tend to vote as blocks.

JUDGE KEENAN: At that time. Do you have any evidence the Supreme Court was relying on 2015 statistics in making these statements? They weren't in the record.

MR. RAILE: In conceding this point, they relied on the 2013 information. But -- if I may, I would appreciate -- if you'd like me to move on from this section and examine the professor and build a record so we can brief this, because he has a plane to catch, and I would like to get done in half an hour, if it would please the Court.

JUDGE PAYNE: I'd like him to get done in half an hour, too, but do you want to let him build a record? I cannot understand, for the life of me, how it's relevant in the case. Yet, I question that whole decision, because the plaintiffs didn't object to this thing, and they're offering later evidence as well, and so --

JUDGE KEENAN: My concern, too, is the Court isn't compelled to hear this testimony just because nobody objected to it properly.

JUDGE PAYNE: That's right.

JUDGE KEENAN: If it's not relevant and is not a [844] guidepost that the Supreme Court used that we're obligated to consider, then I don't see why we have to sit here and listen to it.

MR. RAILE: I'll confine the examination --

JUDGE PAYNE: Excuse me. I think Ms. Khanna had something.

MS. KHANNA: I was going to clarify the point that we provided rebuttal expert testimony on this very point saying that the analysis was post-dating the 2011 redistricting process. While it was not part of the formal trial exhibit objections, we have rebutted it in rebuttal reports, and I'll cross-examine at least one witness on this very issue.

JUDGE PAYNE: All right. I think we're all in agreement that we don't need to hear the information about the demographics. If it were 2011, it would be highly relevant. I don't have any question about that. But now that door is closed, I think. So if you have something else to talk about, that would be helpful.

MR. RAILE: Thank you, Your Honor.

Q. Turn to page 14 of your expert report, Dr. Hood.

A. 14, okay.

Q. And what is the chart at the top of the page?

A. Are you referring to table ten?

Q. Yes, sir.

A. Okay. So this is a racial block voting analysis I [845] performed regarding the House of Delegates election HD 69 from the 2009 Democratic primary.

JUDGE PAYNE: Pardon me. Are you on Exhibit 103?

MR. RAILE: Yes, Your Honor.

JUDGE PAYNE: Page 15?

MR. RAILE: Page 14 in Dr. Hood's pagination.

JUDGE PAYNE: In Dr. Hood's, okay. Table eight. It's at the top of the page; is that right? Table ten, thank you.

Q. So, Dr. Hood, what analysis did you perform here?

A. I performed an analysis to determine how the racial groups in this particular House of Delegates district were voting for these particular candidates.

Q. And how did you perform that analysis?

A. I used a technique called ecological inference.

JUDGE PAYNE: Equal what?

THE WITNESS: Ecological inference, Your Honor.

Q. And what is the purpose of that analysis?

A. This is an interesting case, because we have a mixture of white and black candidates running in this Democratic primary, and we see that the preferred candidate of choice for the black community is Brown at 55.6 percent versus the preferred candidate of choice for the white community who is Betsy Carr who scores 81.2 percent of the white vote.

It's interesting because the preferred candidate in -- [846] this is a majority black district as well. The preferred candidate of the black community loses in the Democratic primary.

Q. This is a 2009 election?

A. Yes.

Q. And why is that significant of a black-preferred candidate losing in the Democratic primary?

A. Well, you know, I probably testified to this, and I've certainly talked about this before. An absence of racially polarized voting in a general election scenario is not necessarily indicative that racially polarized voting doesn't exist.

Sometimes we have to look to the Democratic primary, because sometimes the preferred candidate of the black community can be found in a Democratic primary. If they win the Democratic primary, they would probably also be the preferred candidate of the black community in the general election, but sometimes they lose the primary. So it's important to look at both primaries and general elections in my opinion.

Q. Let's turn to page eight of your report.

A. Okay.

Q. And this is a section called Issues with Specifying Exact Proportion of Black VAP, or voting-age population; is that correct?

[847] A. Correct.

Q. What's going on in this section of the report?

A. This is a response to Professor Palmer's report where he has a discussion in his initial report about

different -- specifying different levels of black VAP in a district and what the effect is in terms of election outcomes.

Q. And what response do you provide in this section?

A. Well, I provide some critiques of that.

Q. And what's one critique?

A. Let me say one thing just from the get-go here, and that is that when we're using past election results to predict some future outcome, we're trying to make a prediction about something.

MS. KHANNA: Objection, Your Honor. This is both nonresponsive and not included in his actual report.

JUDGE PAYNE: Well, I don't think the second ground applies because he's setting the stage for what he's going to say, but -- let's let him finish -- he's trying to put a caveat and a framework on it, so go ahead. Overruled.

THE WITNESS: I'm just saying we're making a prediction about a future event that hasn't occurred yet when we're doing that. That's all I wanted to say.

Q. So what is one criticism that this section provides to Dr. Palmer?

A. Okay. Well, this -- you know, some of these criticisms [848] are unavoidable, but, again, it makes it difficult to make an exact prediction. That's the point to what I'm saying around a lot of this, and one of those, again, is that we derive an estimate from the statistical models, and it's an estimate, and it has a range of uncertainty around that estimate.

So, again, we can come up with a best point estimate, but, again, there's a range of uncertainty around that. We have to deal with that, we have to incorporate --

Q. Would it be fair to say there is a margin of error?

A. Yes.

Q. That's one concern. What's another?

A. Another concern is that in Virginia, specifically in Virginia, we have to use voting-age population data. In other states, we may have more specific data that can give us a much better idea of trying to predict vote outcome.

So, for instance, if we had racial registration data -- we don't have that in Virginia -- or if we had even better racial turnout data. So, you know, again, we're basing an election outcome, or what we think an election outcome is going to be, on voting-age population. So it's several steps removed from what turnout might actually look like. So that's another sort of point of critique.

Q. And is that imprecision something that's captured in the margin of error produced in an ecological inference analysis?

A. With some imprecision. I don't think that is. That would [849] be -- the estimate would be better if we had better data in that case.

Q. And what we're doing in Virginia is we're comparing something like black -- or, excuse me, voting-age population versus election results, whereas in other states, you might be considering something

more precise like racial turnout data or something like that?

A. Right. In some states, we could get much more precise estimates of actually who turned out in that election racially speaking.

Q. What's another concern?

A. Turnout in general. Again, if we're basing our election estimates on, say, presidential elections or even gubernatorial elections, those aren't always indicative in Virginia of these odd-numbered election years some of which feature state constitutional offices, and sometimes they don't. And so, for instance, in table five, we can see that turnout rates vary greatly across these different types of election cycles.

Q. What's another concern that you have?

A. Well, we're using census data, and, of course, census data is taken at the beginning of the decade. If we're making estimates later in the decade, we're going to have a loss of precision because of shifting that's going on.

Another thing related to census data as well is that you could create a district that's say, just hypothetically,[850] 53 percent black voting-age population, but certainly it's possible, over the course of a decade, a ten-year timeframe, that the black VAP may shift. It could shift down in that district, for instance.

Q, That also create a problem if the legislature tried to do some kind of a statistical study at the end of a cycle going into the redistricting?

A. Yes.

Q. How so?

A. They wouldn't have the new census data to rely on. They'd have to use data from the previous census cycle.

Q. So there would be a mismatch between what the statistical analysis showed them and the actual new census data and the new lines and everything else?

A. There could be, again, depending on population shifts that may have occurred.

Q. I notice that there is an exhibit to your expert report.

A. There's an attachment, yes. It's an expert report written by Professor James Loewen.

Q. What is that?

A. It's an expert report that Professor Loewen wrote.

Q. Why did you attach it here?

A. Well, I found it relevant. Professor Loewen looked at racially polarized voting patterns specifically in House of Delegate elections in Virginia in the previous cycle.

[851] Q. What did he find?

A. He found the presence of racially polarized voting, one point being there's a pattern established. Unless something interrupts that pattern, it's highly likely it's probably going to continue. I think some of the work shown in my report, as well as others', indicates that racially polarized voting still exists in Virginia today.

Q. Now, you also wrote about a warming and cooling effect, I believe citing Dr. Loewen; is that correct?

A. Right. Those are his terms, I want to make clear, but, yes, I talked about what he was discussing at various points.

Q. Why is that relevant to your discussion in Section, I believe it's 4 B of your report?

A. Well, Professor Loewen's warming and cooling effects deal with the percentage of black VAP in a majority-minority district and the different effects it can have. So, for instance, you know, bumping up the black -- this is, again, Professor Loewen describing this effect. He says that bumping up the black VAP in a district beyond a bare majority can produce a warming effect for the black community. It can increase things like registration and turnout rates among black voters. It can produce better-qualified black candidates entering races in that particular district, higher turnout -- maybe I just said that. Higher vote percentages for black candidates as well.

[852] The converse can be true, too, that there can be a cooling effect in that case for the white community. You may see the emergence of fewer white candidates, white turnout rates may fall in that kind of district. So his point was that sometimes you may have, you know -- because of this effect, you may have lopsided victories or even non-contested elections. Professor Loewen's contention was it wasn't evidence of packing necessarily, though.

Q. How does this relate to Dr. Palmer's analysis where he predicts election results at various black

voting-age population levels such as 55 percent, 50 percent, 45 percent?

JUDGE PAYNE: Excuse me. You said how does this relate. What are you talking about; the report or one of the three or four things he was talking about?

Q. How does your discussion of the warming and cooling effect in your report relate to Dr. Palmer's discussion of -- prediction of election results at various black voting-age population levels?

A. Well, again, you may be able to produce -- he produced estimates from his vote models of, you know, fairly wide margins for black candidates in those instances, but, again, according to Professor Loewen, you might get that effect until you get down to some threshold level where there's a failure, and, for instance, the preferred candidate of the black community might actually lose in a district.

[853] Q. And so how would you ever find out if you had reached that level?

A. Well, you would find out, I guess, post hoc, after an election happened.

Q. So you would -- you could drop the black voting-age population in a district and then watch to find out what different story lines might emerge, and then what happens then?

MS. KHANNA: Leading question.

JUDGE PAYNE: It sort of is, particularly with all that story line in there. Try it without leading.

MR. RAILE: Yes, Your Honor.

Q. So you'd have to find --

MR. RAILE: I think I can live with his last answer. I'll move on, Your Honor.

Q. So you -- just to say for the record, in your report you have some -- you have a racially polarized voting analysis in 2009. That is a data point showing racial block voting in that election; is that correct?

A. That's correct.

Q. And you have an appendix with information from the prior decade showing racially polarized voting; is that correct?

A. Right, from Professor Loewen's report, yes. I didn't produce that data.

Q. And you do also have a set of 2013 elections that we won't analyze here that also show racially polarized voting in [854] Virginia races; is that correct?

A. Yes.

JUDGE PAYNE: Is that table six --

MR. RAILE: It's several tables, Your Honor.

JUDGE PAYNE: -- eight, and nine, Dr. Hood, that are the 2013, six, seven, eight and nine?

THE WITNESS: Those are some of them, Your Honor.

JUDGE PAYNE: But are they all had 2013?

THE WITNESS: Yes, they are, except for table ten is not.

JUDGE PAYNE: Ten is for 2009.

THE WITNESS: Yes, Your Honor. Tables two, three, and four are for 2013 as well.

Q. Dr. Hood, how long did you have to prepare this report?

A. About two weeks.

Q. Is that shorter or longer than you normally have?

A. Shorter.

Q. By how much?

A. It varies greatly. Sometimes I might have months to prepare an expert report. Usually not two weeks.

MR. RAILE: Thank you, Your Honors. No further questions of this witness at the time.

JUDGE PAYNE: Before you leave, what's the pertinence of the 2013, because that may effect, or not, the cross-examination? Why do we not have the same temporal [855] problem with the 2013 comparison?

MR. RAILE: I just wanted to establish that we have the pattern shown. If you think that it's not relevant, then I respect that, Your Honor. Thank you.

JUDGE PAYNE: Do you think -- are you offering it because you think it is relevant for us to look at -- in other words, I took what you were doing as saying, Loewen said this in 1991, and Dr. Hood says, this is the result in 2013, so Loewen is borne out, and that 2009 is during the period. I thought that's what you were doing with the report.

MR. RAILE: Yes, Your Honor.

JUDGE PAYNE: That's why they didn't object to it, I guess. I'll let her cross-examine about it.

CROSS-EXAMINATION

BY MS. KHANNA:

Q. Good afternoon, Dr. Hood.

A. Good afternoon.

Q. You provide no analysis or rebuttal in response to Dr. Rodden's report in this case; is that right?

A. That's correct.

Q. And you provide no response to Dr. Palmer's analysis of the racial composition of populations moved in and out of the challenged districts.

A. That's correct.

[856] Q. And you provide no response to Dr. Palmer's race-versus-party analysis; is that right?

A. That's correct.

Q. And, in fact, you concluded in your 2015 report that HB 5005 did not seek to pack Democratic voters in the challenged districts; correct?

A. Correct.

Q. And you provide no analysis in response to Dr. Palmer's conclusion that if all the population needed in each underpopulated district were made up of white voters who unanimously voted against black-preferred candidates, the black-preferred candidates would still win; correct?

A. That's correct. I didn't respond to that.

JUDGE PAYNE: Why don't you deal with what he did respond to? I'm sure that if he didn't respond to it, we'll not hear anymore about it.

MS. KHANNA: Yes, Your Honor.

JUDGE PAYNE: That will maybe streamline things a little bit.

Q. I'd like to turn your attention to table ten on page 14 of your report, and I'm using your page numbers, not the Exhibit 103 page numbers. Do you see that?

A. Yes.

Q. This table reflects your point estimates of votes by racial group for certain candidates in this election --[857] actually in this primary; is that right?

A. That's correct.

Q. Are you familiar with the concept of confidence intervals?

A. Yes.

Q. Is it fair to say that a confidence interval reflects a band of uncertainty around a given point estimate?

A. Yes.

Q. But you don't provide confidence intervals for any of the point estimates in any of your tables; is that right?

A. That's correct.

Q. And, in fact, you do not consider the confidence intervals in forming your conclusions on racially polarized voting at set out in your supplemental declaration; correct?

A. Correct.

Q. One of the goals of your racially polarized voting analysis is to determine whether a majority of whites are voting for or against African-American-preferred candidates; correct?

A. Correct.

Q. So where, for instance, you have a point estimate of, say, 55.6, we could not know whether or not the confidence interval actually falls below 50 percent; is that right?

A. Well, not without looking at it, no.

Q. We can't know based on your report; correct?

A. Not this table, no.

[858] Q. Or in any of your tables.

A. That's correct.

Q. You would agree, wouldn't you, that it is standard practice in political science, when presenting model estimates, to also provide some indicator of statistical uncertainty?

A. Yes.

Q. In fact, you consider that part of the discipline?

A. Yes.

JUDGE PAYNE: Excuse me a minute. Is table ten a model, or is it your calculation of what actually happened based on the records of the election? I'm confused.

THE WITNESS: Your Honor, this is -- these are estimates from a model I ran using data from the election.

JUDGE PAYNE: All right, I understand.

Q. Dr. Hood, you testified on direct about a section starting on page eight of your report entitled Issues with Specifying an Exact Proportion of Black VAP; is that right?

A. Yes.

Q. And in the beginning of this section, you state that your regional voting analysis from previous pages indicates that the creation of a majority-minority district might be necessary; correct?

A. Yes.

Q. And that regional voting analysis is based entirely on 2013 elections; correct?

[859] A. The analysis I presented, yes.

Q. You then go on to note that there are a number of reasons why map-drawers engaged in creating a majority-minority district might find it necessary to increase minority voting-age population beyond 50 percent; correct?

A. Correct.

Q. And you go on to provide a list of hypothetical reasons why that might be so?

A. I don't know if I'd use the word hypothetical. They are all considerations that I think are important.

Q. I guess to be clear, this portion of your report does not purport to provide actual reasons that actually drove these map-drawers drawing HB 5005 to establish a 55 percent BVAP floor; correct?

A. Yes. I'd like to say one other thing, thought. These are all considerations that need to be taken into account any time these estimates are being made. But the answer to your question specifically is yes.

Q. You don't know whether the map-drawers took of any these considerations into account?

A. I don't have any knowledge of that.

Q. The first reason that you identify and you discussed on direct as to why a map-drawer might find

it necessary to increase the minority voting-age population is that any statistical model is accompanied by a degree or range of [860] uncertainty; is that correct?

A. That's correct.

Q. And there are ways for statistical modeling to take into account that level of uncertainty; correct?

A. Correct. I'm just pointing that out.

Q. And for ecological inference estimates, that would include confidence intervals.

A. Yes.

Q. Like the ones produced in Dr. Palmer's report.

A. Right.

Q. The second reason you identified as to why a map-drawer might find it necessary to increase the BVAP in a majority-minority district was related to turnout; correct?

A. Correct.

Q. And you specifically noted that turnout patterns can vary across elections?

A. I would say they do vary. They can and they do.

Q. So let's take a look at table five on page ten of your report.

A. Okay.

Q. Table five reflects overall turnout for each election listed; is that right?

A. That is correct.

Q. It does not examine turnout by race in any one election.

A. Right. Virginia doesn't report turnout by race.

[861]

Q. It does not examine turnout in any region of the state?

A. That is correct. Those are state-wide turnout numbers.

Q. And it certainly does not examine turnout in any specific district in the state?

A. That is correct.

Q. So there's no way to know from table five whether black turnout was higher than white turnout in any given district in any given election; correct?

A. Not from that table, no.

Q. Or vice versa?

A. Correct.

Q. You also cite on page ten of your report a single statistic from the most recent census survey for the 2016 presidential election.

A. Table ten?

Q. Sorry, I'm looking on page ten of your report. Here you cite a single census survey statistic about the 2016 election, presidential election. That's in the first paragraph?

A. Right.

Q. That reflects state-wide turnout across all of Virginia; right?

A. Right. That's correct.

Q. In the 2016 presidential election.

A. That is correct.

Q. Which did not include an African-American candidate.

[862]A. No.

Q. And you performed no analysis to determine whether that 5.3 gap between black and white voter turnout state-wide for the 2016 presidential election is statistically significant; is that right?

A. Correct.

Q. You provide no analysis of turnout differences between African Americans and whites in any of the challenged districts; right?

A. I did not perform any turnout analyses, that's correct.

Q. The third reason that you identify as to why a map-drawer might find it necessary to increase the BVAP in one of the challenged districts is that BVAP may change over the course of a decade; is that right?

A. It's certainly possible, yes.

Q. You cite as an example the fact that the BVAP of District 71 has dropped seven-tenths of a percent over a four-year period from 2012 to 2015.

A. Yes. I cited that statistic, yes.

Q. You performed no other analysis of BVAP changes over time in the 12 challenged districts; is that right?

A. Correct.

Q. And no analysis of whether that seven-tenths BVAP drop in District 71 has had any effect on African Americans' ability to elect.

[863] A. That's correct.

Q. Or whether even a five percentage point drop in BVAP would have any effect on African Americans' ability to elect in that district.

A. That's correct.

Q. Another reason that you've identified as to why a map-drawer might find it necessary to increase the BVAP in a majority-minority district is that African Americans may not be able to nominate their preferred candidates in primaries; correct?

A. I discuss that issue. I don't know that that's discussed in this section of my report.

Q. You can turn to page 11. That's included in this section of your report?

A. Okay. Page 11 using my page numbers?

Q. Yes, sorry.

A. Okay. Which paragraph?

Q. I'm looking specifically at the paragraph that says "outside of the issues discussed." Here, you discuss primary contests.

A. Okay, yes.

Q. So this is one of the reasons that you cite as to why one might consider raising the BVAP in a given majority-minority district?

A. Yes, that's correct.

[864] Q. And here, to address this, you look specifically at the 2013 Democratic primary for Attorney General, and you do that in only four House of Delegates districts; correct?

A. Correct.

Q. That's a primary, of course, that took place after the 2011 redistricting process?

A. That is correct.

Q. You also looked at the 2009 Democratic primary for House District 69. That's table ten on page 14 of your report.

A. Correct.

Q. You did not provide any analysis of racially polarized voting in any Democratic primaries in any other challenged district; correct?

A. This is the only one, correct.

Q. Instead, you chose this one primary from this one year in this one district because you knew in advance that it was a primary in which a white candidate had defeated a black candidate; correct?

A. I knew that was the outcome.

Q. The answer is yes?

A. Well, that wasn't the only reason it was chosen. One reason it was chosen is because there was action in a Democratic primary race between white and black candidates.

Q. You did not even look into how often an African-American candidate drew a white challenger in a Democratic primary in [865] any of the challenged districts; correct?

A. That is correct, that's true.

Q. You did not inquire into how often an African-American candidate lost a Democratic primary to a white candidate in any of the other challenged districts; right?

A. That's true.

Q. But you did know of this one example in 2009 in District 69?

A. Yes.

Q. Now, you wouldn't draw any conclusions based on one primary in one district about racially polarized voting in Democratic primaries in all of the challenged districts; correct?

A. No, but certainly I can draw a conclusion about this district.

Q. So you conclude from table ten that the real candidate of choice for black voters was defeated back at the primary stage despite the fact that blacks constituted 56 percent of the voting-age population for this district; correct?

A. That is correct.

Q. And unlike any of the other elections that you analyze, this 2009 Democratic primary would have been available to map-drawers in 2011?

A. It would have been available, yes.

Q. So if map-drawers had wanted to consider this primary, [866] they would have known that in 2009, the white candidate was pitted against a black candidate in the District 69 Democratic primary; right?

A. Yes.

Q. And they would have known that the white candidate defeated the black candidate in that primary.

A. Yes.

Q. Just like you knew when you chose it for your supplemental report.

A. Yes.

Q. So, in your opinion, this information might have justified drawing District 69 to increase its BVAP; correct?

A. Yes.

Q. I believe you have in front of you your 2015 report. Can you please turn to Defendant-Intervenors' Exhibit 15, page 14.

A. My page 14?

Q. No. Actually here, I'm referring to the exhibit page 14. It's your page 13, table eight. Based on your table eight, can you please tell me what the BVAP of District 69 was in 2009?

A. 56.3.

Q. And what is the BVAP of District 69 in 2011 after enactment of HB 5005?

A. 55.2.

Q So in District 69, which, according to your expert testimony, the map-drawers might have had some indication of an [867] example, based on a recent primary in which an African-American-preferred candidate lost a primary, the map-drawers lowered the BVAP of that district; is that right?

A. That's what happened, yes.

Q. You also point out the Loewen report as part of your reasons why a map-drawer might want to increase the BVAP of a majority-minority district; is that right?

A. Yes. Maintain the BVAP in a district.

Q. Counsel for intervenors alerted you to that report; is that right?

A. I learned of the report, I think, in the first iteration of this case.

Q. By counsel for the intervenors?

A. Yes.

Q. What is the date of that report?

A. 2001.

Q. And do you know the case in which this report was offered?

A. Um, well, I think it's *Wilkins v. West*. I'm not totally sure of that.

Q. And this is not actually the final version of the report, is it?

A. I'm not certain of that either.

Q. You don't know whether this is the final version of the report?

A. No.

[868] Q. You don't know whether this particular version of the report was ever submitted to a court?

A. It's my understanding it was.

Q. But you don't know for sure?

A. That's my understanding.

Q. You've never spoken with James Loewen; is that right?

A. That is correct.

Q. In preparing your supplemental report, you didn't review any other expert reports submitted in

this particular case; is that right? The one in which the Loewen report was supposedly submitted.

A. That is correct.

Q. And in preparing your supplemental report, you weren't aware whether there were any critiques levied against the Loewen report by any other experts in that case; correct?

A. Since I didn't read the other expert reports, that's correct.

Q. And you didn't review the Court opinions in that case in preparing your report; correct?

JUDGE PAYNE: A lot of these are self-evident and sufficiently pointed out in briefs, and they're good points to make before a jury, but I don't think that's where we are, and you are pretty well beyond where the direct examination went any way in terms of time. So can you wrap up?

MS. KHANNA: Your Honor, I'd ask the Court's leeway [869] to ask a few more questions.

JUDGE PAYNE: Very few, because you are at the point where you're -- you are trenching on their time. You had a lot of time to do your case. They get some time to do theirs. You're taking up a lot of time in cross-examination and a lot of it is not necessary is my point, to be direct about it. So see if you can wrap it up.

MS. KHANNA: I will Your Honor. Thank you.

Q. Professor Loewen, in his report, used a methodology called ecological regression; is that correct?

A. That's correct.

Q. Is it your understanding that ecological regression doesn't make use of all available information in conducting a racially polarized voting analysis?

A. It's my understanding, having used both ecological regression and ecological inference, that ecological inference is able to make use of more facts about the data -- one of the things ecological inference can do is bound the estimates between zero and 100. Sometimes ecological regression can give you estimates outside of, you know, possible bounds.

Q. Is it your understanding that ecological regression results in blatantly incorrect answers?

A. Are you asking for my --

Q. Is that your opinion, that ecological regression results in blatantly incorrect answers?

[870] A. I didn't say that.

Q. Is that a no?

A. No.

JUDGE PAYNE: He said, I didn't say it. Come on. Let's don't quibble over things like that. It takes up time.

Q. In preparing your supplemental report, you assumed that Professor Loewen had used the proper data; correct?

A. Yes.

Q. You assumed that he applied ecological regression properly; correct?

A. Yes.

Q. And you never replicated Professor Loewen's analysis using the elections he relied upon; correct?

A. Correct. I didn't have his data.

Q. You certainly didn't replicate that analysis using more recent elections?

A. Well, I performed my own analyses.

Q. Did you replicate Professor Loewen's analysis based on more recent elections?

A. I'm a little lost with that question.

JUDGE PAYNE: So am I. I don't know how you can replicate something with different data. So let's go ahead.

MS. KHANNA: I'll clarify, Your Honor.

Q. On page ten of your report, you state that Professor Loewen determined that a district with 50.3 percent black VAP [871] would give African Americans even orders of winning election. Did I read that correctly?

A. You read it correctly.

Q. And Professor Loewen's analysis and conclusion was based on elections from the 1990s; correct?

A. Correct.

Q. And you never replicated Professor Loewen's analysis using those elections; correct?

A. I guess I would just answer I did not replicate Professor Loewen's analyses. That's true.

Q. You never determined another number at which African Americans would have even odds of winning an election using any data; correct?

A. I didn't make that particular calculation. That's a little bit different from replication of analyses.

Q. You note on page 11 of your report that Professor Loewen's report indicates that of the races he analyzed in Virginia, black candidates were unable to win districts that contained less than 52 percent voting-age population; did I read that correctly?

A. Yes.

Q. But you are certainly aware of elections in Virginia since 2001 in which black candidates have been able to win districts that contain less than 52 percent black voting-age population, aren't you?

[872] A. Yes. In a general sense, yes.

MS. KHANNA: Thank you, Dr. Hood. I have no further questions.

THE WITNESS: Thank you.

THE COURT: Any redirect?

MR. RAILE: No, Your Honor.

JUDGE PAYNE: All right. You may be excused. Thank you for giving us your evidence.

THE WITNESS: Thank you, Your Honor.

JUDGE PAYNE: Call your next witness.

MS. McKNIGHT: Your Honor, thank you. Defendant-intervenors call Delegate O'Bannon to the stand.

JOHN M. O'BANNON, III,

a witness, called at the instance of the intervenor-defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. McKNIGHT:

Q. Good afternoon, Dr. O'Bannon. Could you start by telling the Court which house district you represent?

A. Yes, ma'am. I represent the 73rd House District in the House of Delegates.

Q. Now we'll get to the location of your district in just a moment. I have just a few questions for you before then. How [873] long have you represented HD 73?

A. I've represented the 73rd district for 17 years.

Q. And aside from your role as a delegate, what is your profession?

A. Yes, ma'am, I'm a medical doctor.

Q. And is your office in your district?

A. Yes, ma'am, my office is in the district.

Q. And what about the hospital where you practice?

A. I have practiced at Henrico Doctors' Hospital since 1974.

Q. And is it in your district, too?

A. It is in the middle of the district, yes, ma'am.

Q. Now, could you describe to the Court your role in the 2011 redistricting process.

A. Yes, ma'am. In that year, I was actually a member of the Privileges and Elections Committee, so I was involved in some of the public hearings, and I think we did a fly-around the state, and I participated in those public hearings.

MS. McKNIGHT: Now, I ask to have put on the screen Defendant-Intervenors Exhibit 91 at pages 145 and 146.

Q. Now, starting with page 145 on the screen, Delegate O'Bannon, is this a depiction of your house district prior to the 2011 redistricting?

A. Yes, ma'am, it is.

Q. Turning to page 146, is this a depiction of your house district after the 2011 redrawing?

[874]

A. Yes, ma'am, it is.

MS. McKNIGHT: Now I ask to have put on the screen Defendant Intervenors' Exhibit 94 at page four.

Q. Delegate O'Bannon, I'm going to ask you some questions about the changes --

MS. McKNIGHT: Actually, pardon me. Could we put Defendant-Intervenors' Exhibit 91, page 146 back on.

Q. Now, this is your district as drawn in the 2011 redistricting process; correct?

A. Yes, ma'am.

Q. And, now, do you share a border with House District 71?

A. Yes, ma'am.

Q. And for the Court, could you touch the screen on the map where the border is shared between District 73 and 71.

A. I think it's here to here (indicating).

MS. McKNIGHT: Now, could we briefly go back to 145, please, Amy.

Q. And could you show for the Court on this screen the border between your district and 71 prior to the redrawing.

A. I think it's here and here (indicating).

Q. Now, it seems that there were changes made in the border between your District 73 and District 17; is that right?

A. Yes, ma'am.

Q. I'm going to ask you questions about it. Is it easier for you to look at this map or the yellow colored map?

[875] A. This one is fine.

Q. Okay.

MS. McKNIGHT: If we can turn to 146 which is the current district.

Q. Could you explain to the Court what was going on in the area of your district around where it bordered other districts around the time of the 2011 redistricting?

A. My understanding of the numbers was that many of these districts, 68, 69, 71, I think 74 even had all loss population, and so as a result of that, that I was going to need to be moved west as they needed to get bigger. So that is what I understood.

Q. And, now, looking at page 146, the movement of the border between 71 and 73, the change in the border, did it become shorter or longer, the border?

A. It looks as if it became shorter.

JUDGE PAYNE: So I understand it, the border is from Bryan Park down to where the -- it cuts across 71, and then is the other side of that little tip down

there, is that part of 68, or is that part of yours? I mean part of 71.

THE WITNESS: This is -- this piece here is 68 now. 68 and 71 borders.

JUDGE PAYNE: Yours is much shorter than it was before.

THE WITNESS: Yes, sir.

[876]

Q. At the time these changes were made, did you understand that they were made based on racial reasons?

A. I had no reason to suspect that, no, ma'am.

Q. Why not?

A. That was not the issue. The issue here was I had to, you know, go west because all of those areas had to grow. Race was not an issue that I with was aware of in that.

Q. Now, in the redistricting process, did you get everything you wanted as far as your new district?

A. No, ma'am.

Q. How so?

A. Well, I lost some very red districts. I gained some red districts. I gained some deep blue districts, and I gained a number of districts that might be considered tween districts.

Q. You took some lumps along the way.

A. Yes, ma'am.

Q. Did you expect your district to be perfect in the redrawing?

A. No, ma'am.

Q. Now, Delegate O'Bannon, plaintiffs have put Delegate Jones' credibility at issue. Do you have any reason to doubt Delegate Jones' credibility?

A. I do not.

MS. BRANCH: Objection, Your Honor. I don't think the fact witness can comment on credibility. I don't [877] understand how it's relevant.

MS. McKNIGHT: Your Honor, plaintiffs have put at issue in a variety of pleadings as well as in trial testimony Delegate Jones' credibility. If you'd like, I can lay some foundation for how well Dr. O'Bannon knows --

JUDGE PAYNE: What rules does it come in under? Credibility witnesses are very limited, aren't they?

MS. BRANCH: Your Honor, I think this is improper character evidence under Rule 404.

JUDGE PAYNE: How do you get it in?

MS. McKNIGHT: Your Honor, they have put his credibility at issue in a variety of pleadings as well as in his trial testimony, and we believe it's fair to have a fact witness who knows Delegate Jones, and if I'm allowed to lay a foundation with one question, I can show you how well he knows Delegate Jones, and it's relevant to the Court's assessment of the testimony from Delegate Jones yesterday, what kind of weight to give it.

JUDGE PAYNE: Your objection is under what?

MS. BRANCH: Under Rule 404, Your Honor.

THE COURT: What part of it? It's a long rule with a lot of subdivisions. I want to make sure I know where you are.

MS. BRANCH: Rule 404(a)(1), Your Honor.

JUDGE PAYNE: "Evidence of a person's character or character trait is not admissible to prove that on a particular [878] occasion the person acted in accordance with the character or trait."

MS. BRANCH: Your Honor, we have specifically questioned some of Delegate Jones' assertions regarding the 2011 redistricting. We've not questioned his character in general.

MS. McKNIGHT: Your Honor, this is applicable if you look at Rule 608, a witness's character for truthfulness --

JUDGE PAYNE: It's not 404 at all. Rule 608.

MS. McKNIGHT: And there, "a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness."

JUDGE PAYNE: Is that what you propose to ask Delegate O'Bannon?

MS. McKNIGHT: That's correct.

JUDGE PAYNE: How do you deal with 608(a)?

MS. BRANCH: Your Honor, I would direct the Court's attention to the last sentence of Rule 608(a) which says, "but evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." We've not attacked his character for truthfulness. We've only questioned

some of the assertions that he's made based on his memory.

JUDGE PAYNE: You think attacking his credibility on [879] a number of occasions you're not attacking his truthfulness? Is that what you're saying?

MS. BRANCH: Correct.

JUDGE PAYNE: Overruled. You can ask the question as long as you lay the foundation. He has to know what he's talking about and show he knows what the reputation is. If he doesn't know it, just the fact he's known him a long time doesn't happen.

MS. McKNIGHT: I understand.

JUDGE PAYNE: You have to ask some foundation.

MS. McKNIGHT: I understand, Your Honor.

Q. Dr. O'Bannon, how long have you known Delegate Jones?

A. I have known Delegate Jones for 17 years.

Q. And in what capacity?

A. I have known him as a peer and a member of the General Assembly and as a committee chairman and as a person who has carried many very difficult, challenging, complex pieces of legislation as recently as last year when he carried the RS legislation and Virginia Economic Development Partnership legislation which required building consensus and working with all parties involved.

He is not known as an ideologue. He voted for a tax increase in 2004, and I watched him in his committee work. He is careful to listen to all parties concerned which is why he's an effective legislator.

[880] Q. And do you have any doubt about his character for truthfulness?

A. None at all.

Q. Why not?

A. I think I've basically stated --

JUDGE PAYNE: I think you have to establish whether the witness has knowledge of the witnesses having any reputation for truthfulness or untruthfulness or by an opinion about the character for truthfulness. Those are the two ways you can address the issue, I think. Is that not what 608(a) says?

MS. McKNIGHT: Pardon me, Your Honor. Let me rephrase my question.

Q. Do you have any testimony to provide about Delegate Jones' reputation for having a character for truthfulness?

A. I can only base my testimony on what I've observed for the last 17 years in working with him.

Q. What is your opinion about Delegate Jones' character?

JUDGE PAYNE: For truthfulness.

MS. McKNIGHT: For truthfulness.

A. I think Delegate Jones is a very truthfulness person and a very truthfulness legislator.

MS. McKNIGHT: Thank you very much, Delegate O'Bannon. No further questions.

[881]

CROSS-EXAMINATION

BY MS. BRANCH:

Q. Good evening, Delegate O'Bannon. You testified that you represented the 73rd district at the time of the 2011 redistricting?

A. Yes, ma'am.

Q. And your district is not at issue in this case?

A. Yes, ma'am.

Q. And your district borders House District 71?

A. Yes, ma'am.

Q. And you've testified you don't know how House 71 changed as a result of redistricting; isn't that right?

A. Other than what we've looked at here on the maps.

Q. Specifically talking about House District 71, you don't know how it changed as a result of redistricting; correct?

A. No, ma'am.

Q. You served on the Privileges and Elections Committee, you said?

A. Yes, ma'am.

Q. But you didn't play a significant role?

A. Not beyond what I've testified to.

Q. You didn't play a significant role on the P&E Committee; correct?

A. Well, flying around the state on an airplane that almost crashed, I think, probably qualifies as some significant role.

[882] Q. In fact, that's all you remember about the public hearings; isn't that right?

A. That's correct.

Q. You don't remember anything substantive about what happened at the hearings?

A. I don't remember any specific questions.

Q. Nothing substantive.

JUDGE PAYNE: Ms. Branch, he really wasn't asked anything about any of this on direct examination, and your limit is what he was asked about on direct. If you have anything else, ask it. Otherwise, let's let the witness go.

MS. BRANCH: Yes, Your Honor.

Q. You did not have any input in how your district was drawn; correct?

A. That is correct.

Q. And you've never communicated with any member of the Black Caucus about how their districts were drawn; correct?

A. That is also correct.

Q. Never communicated with Delegate McClellan; correct?

A. That's correct.

MS. BRANCH: No further questions. Thank you.

JUDGE PAYNE: Any redirect?

MS. McKNIGHT: No, Your Honor.

JUDGE PAYNE: Can he be excused? Thank you very much for being with us, Dr. O'Bannon, and giving us your testimony. [883] Do you have another witness?

MS. McKNIGHT: Yes, Your Honor. We call Delegate Wright to the stand.

THOMAS WRIGHT,

a witness, called at the instance of the intervenor-defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. McKNIGHT:

Q. Good afternoon, Delegate Wright.

A. Good afternoon.

Q. Could you start by telling the Court which district you represent.

A. 61st district.

Q. And how long have you represented that district?

A. 17 years.

Q. And aside from your role as a delegate, what has your profession been?

A. I taught elementary school for one year, and then I helped run the family grocery business for 37 years.

Q. And was that grocery store in your district?

A. Yes, ma'am.

Q. What was your role in the redistricting process in 2011?

A. None.

[884] MS. McKNIGHT: Could you we put up Defendant-Intervenors' Exhibit 91, page 124.

Q. Delegate Wright, I believe this is a depiction of your House District 61 as it stood after the 2011 redistricting.

A. This is not --

MS. McKNIGHT: Pardon.

JUDGE PAYNE: This is 68.

MS. McKNIGHT: Pardon me. I had the wrong page number. There it is.

JUDGE PAYNE: 61 is on page 121.

MS. McKNIGHT: Page 121, thank you, Your Honor.

Q. Now, does this depict your district as drawn after the 2011 redistricting?

A. You mean 2011 or 2001?

JUDGE PAYNE: 2001 or -- this is the benchmark or is this the -- where is 61 after that?

MS. McKNIGHT: Pardon me, Your Honor. In my haste to get through this, I'm getting the wrong page numbers. Page number 122, pardon me, of Defendant-Intervenors' Exhibit 91.

Q. Pardon me, Delegate Wright. I didn't mean to mislead you. Now, is this a depiction of your House District 61 as it stands today after the 2011 redistricting?

A. Yes, ma'am.

Q. And, now, it looks to me as if your district borders both HD 75 and HD 63; is that right?

[885] A. Yes, ma'am, that's correct.

Q. Now, I'm not going to ask any questions about HD 75. It has been deemed constitutional. I am going to focus on the border with your district, between your district and District 63. Could you use the pointer to identify for the Court where that borders exists on this map?

A. (Indicating.)

Q. Starts there, and where does it end?

JUDGE PAYNE: Did you draw it on there or something? Can you tell where the border is?

MS. McKNIGHT: Can you see the red dates, Your Honor? He has placed two red dots, one at the bottom of the border between 61 and 63 and one at the top.

Now, this was just for the Court's orientation. I think it may it be easier to get testimony from Delegate Wright on the map on Defendant-Intervenor's Exhibit 94, page one, which depicts challenged district HD 63.

THE WITNESS: Yes.

Q. Now, on this map, could you identify the same points on the border, where the border between your district and 63 begins and where it ends?

A. Yes, ma'am. From this point to this point (indicating).

Q. And could you touch the screen so that the Judges could see where --

A. I beg your pardon.

[886] Q. Delegate Wright, we've looked at these maps in this case along the way, but for your reference, areas of the map that are shaded in yellow and crosshatched at the same time indicate areas of the map that did not change in the 2011 redrawing.

Does that match with your understanding that the border between your district, HD 63 -- your district HD 61 and District 63 did not change in the 2011 redrawing?

A. Yes, ma'am.

Q. Now, around this border, there's a word saying Amelia. Is that Amelia County?

A. Yes, ma'am.

Q. And that is in your district; correct?

A. Yes, ma'am.

Q. And what is the political performance of Amelia County?

A. It votes reliably strongly Republican.

Q. And then I believe there's a county line in the map under the word Amelia. What is the county below Amelia on the map?

A. Nottoway County.

Q. How does Nottoway County perform politically?

A. It is Republican voting county although not as strong as Amelia.

Q. And Nottoway County is in your district; is that right?

A. Yes, ma'am.

Q. And then to the north of HD 63, there's a word that says Chesterfield. Is that Chesterfield County?

[887] A. Yes, ma'am.

Q. And based on your experience, do you have an understanding of the political performance in Chesterfield County?

JUDGE PAYNE: You are talking about in 2011?

MS. McKNIGHT: Yes, Your Honor.

A. Yes.

Q. And what is the -- what was the political performance of Chesterfield County back in 2011?

A. It votes Republican.

Q. Now, moving back to the line between your district and HD 63, do you have any reason to believe that the border between your district and District 63 was drawn for predominantly racial reasons?

A. No, ma'am.

MS. McKNIGHT: Thank you very much, Delegate Wright. I have no further questions.

CROSS-EXAMINATION

BY MS. BRANCH:

Q. Good evening, Delegate Wright.

A. Yes, ma'am.

Q. You did not communicate with Delegate Jones about redistricting prior to the enactment of the 2011 map, did you?

A. No, ma'am.

Q. So you did not make any requests about, for instance, [888] Nottoway County, which was mentioned on direct, with regards to your district, did you?

A. No, ma'am.

Q. You can describe some of the changes that were made to your district; right?

A. I didn't understand the question.

Q. You can describe some changes that were made to your district in 2011 as a result of the redistricting? I'm not asking you to do so, just a yes-or-no answer. You can describe some; correct?

A. Yes.

Q. You can describe some changes that were made to House District 75 during the redistricting; correct?

A. I can do some.

Q. You have that knowledge.

A. Yes, ma'am.

Q. House District 75 is no longer at issue in this case; is that correct?

A. That's my understanding.

Q. Your district is no longer at issue in this case, has never been an issue?

A. Yes, ma'am, that's correct.

Q. And you don't know about any changes that were made to any other challenged districts in this case; is that correct?

A. No, ma'am.

[889] MS. BRANCH: No further questions. Thank you.

JUDGE PAYNE: Can he be excused permanently?

MS. McKNIGHT: He may.

JUDGE PAYNE: Thank you very much being with us and giving us your testimony. You may be excused permanently.

MS. McKNIGHT: Your Honors, we have one final fact witness to call. We call Delegate Peace to the stand.

CHRISTOPHER K. PEACE,

a witness, called at the instance of the intervenor-defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. McKNIGHT:

Q. Good afternoon, Delegate Peace.

A. Good afternoon.

Q. Could you start by telling the Court which House District you represent?

A. Sure. I represent the 97th district which is half of Hanover County, almost all of King William County, and all of New Kent County.

Q. How long have you represented HD 97?

A. I've represented the 97th district since January of 2006, so almost 12 years.

Q. And what is your profession?

[890] A. I'm an attorney.

Q. And is your law office in your district?

A. My law office and my legislative constituent office is in the district.

Q. What was your role in the 2011 redistricting process?

A. I was a member of the House of Delegates. I voted on the various pieces of legislation, whether regular or special session.

MS. McKNIGHT: Could we put on the display Defendant-Intervenors' Exhibit 94, page five.

Q. Delegate Peace, you share a border with District 74, don't you?

A. I do.

Q. And, in fact, that blue asterisk with your name near it, does that approximate your residence in 2011?

A. It does.

Q. Now, for the Court, could you identify the start and the end of the border that your district shares with HD 74 using your finger to put a dot, red dot on the map at the start and the end.

A. I'll do my best. There are a lot of lines and a lot of different colors here. Hopefully I got that close to right.

Q. Thank you. Now, could you identify for the Court the changes made to the border you shared with HD 74 in House Bill 5005 which was the redistricting plan passed in 2011?

[891] A. Can you repeat the question?

Q. Sure. Could you identify for the Court the changes made to the border you shared with HD 75 in the bill, HB 5005.

A. I'll answer your question that this was the area that was in the district prior to the redistricting.

JUDGE PAYNE: Area that was Antioch, Chickahominy, and Nine Mile?

THE WITNESS: Yes, Your Honor.

JUDGE PAYNE: It was taken out?

THE WITNESS: It was in the 97th before the redistricting, and it was no longer in the 97th after the redistricting.

Q. I'm going to clear the lines just so -- I can ask you some more questions, and the Judges can see some of these names.

Now, the line that your district shares with HD 74, does that have any geographical relationship to the land?

A. The district on the line that I drew previously follows county boundaries. There is also the Chickahominy River which separates Hanover County and Henrico County and also down through New Kent County.

Q. And these precincts that were moved from 97 and placed in 74, they are now on the other side of that river line from District 97, aren't they?

A. They have always been in Henrico County which has always been on the other side of the river.

[892] Q. And do you have an understanding of the political performance in those districts?

A. I do. They have been reliably Republican during my time of office, voting more Republican in gubernatorial years than Democratic. A couple of the precincts did vote for Tim Kaine for governor, but those are the only examples I can give.

Q. And do you believe that these changes made to move these precincts on the other side of that county line, do you believe that they were made for racial reasons?

A. I do not believe that, no.

MS. KHANNA: Lack of foundation. I'm not sure he's established foundation he knew any of the reasons why any of the precincts were moved.

JUDGE PAYNE: Do you want to get a foundation?

Q. In 2011, did anyone ever tell you that these districts were being -- these precincts were being moved out of your district and into District 74 for racial reasons?

MS. KHANNA: Objection, hearsay.

JUDGE PAYNE: Overruled.

A. I was not told that at all, no.

Q. Did you understand that they were moved out of your district for racial reasons?

A. No.

Q. And did you understand that the portions of your border that remained the same with District 74 remained the same for [893] racial reasons?

A. I have no knowledge or understanding that they would have been moved or remain the same for any racial reasons.

Q. Now, Delegate Peace, we have heard from plaintiffs' expert in this case that he has taken the position that election data from a presidential election in 2008 could make predictions about House of Delegates races. Based on your experience as a candidate and delegate, do you agree that even-year presidential elections are useful predictors of voting behavior in Virginia House of Delegates elections?

MS. KHANNA: Objection; calls for improper expert testimony.

JUDGE PAYNE: Sustained.

Q. Delegate Peace, based on your experience as a candidate and delegate, would you ever use even-year

presidential elections to predict voting behavior in Virginia House of Delegates elections?

A. I would never use --

JUDGE PAYNE: Excuse me.

MS. KHANNA: Same objection, Your Honor.

JUDGE PAYNE: Sustained.

MS. McKNIGHT: Your Honor, plaintiffs have put this at issue. The Court has heard from plaintiffs' expert, who has never been in Virginia, that the presidential -- 2008 presidential election has reliable predictive information for [894] House of Delegates elections.

Virginia has a unique election cycle ignored by plaintiffs' expert but well understood by this fact witness. He can certainly testify as a candidate and delegate about his appreciation of the --

JUDGE PAYNE: It's a lay opinion; right?

MS. McKNIGHT: Correct. It's fact witness testimony.

JUDGE PAYNE: Yeah, it's an opinion from a lay witness; right? He is a fact witness, but he's giving an opinion. He is not an expert. You haven't qualified him as an expert, so it's a lay opinion. And those are admissible under two conditions. What are they?

MS. McKNIGHT: Pardon me, Your Honor. I wasn't asking for his opinion. I was asking to understand if he would ever use 2008 election data to help him determine how to campaign in an odd-year race.

JUDGE KEENAN: That's a question asking him to opine on the soundness of using that data in evaluating House of Delegates race, isn't it?

MS. McKNIGHT: I have taken a step away from trying to get his testimony related to plaintiffs' expert testimony. I'd like to elicit his testimony as a fact witness and his experience in these campaigns.

JUDGE PAYNE: I don't think you can do that. Just for the record, the objection was sustained. I hope I said it [895] correctly, put it's late. Anything else for Delegate Peace?

MS. McKNIGHT: No, Your Honor. Thank you.

THE COURT: Cross-examination. You can't have all those papers up there with you.

MS. KHANNA: Just his deposition, Your Honor.

CROSS-EXAMINATION

BY MS. KHANNA:

Q. Good afternoon, Delegate Peace. I know it's late, and I promise I won't keep you long. You represent District 97; correct?

A. Yes.

Q. That borders District 74?

A. Yes.

Q. During the redistricting process, you drew no draft maps; correct?

A. I may have had a conversation with Delegate Jones.

Q. Did you draw a draft map in that conversation?

A. I may have.

Q. Do you recall having your deposition taken in this case a few weeks ago?

A. I do.

Q. Do you recall being asked the question of whether or not you drew any draft maps during the 2011 redistricting process?

A. I may recall that.

[896] JUDGE PAYNE: Page and number.

MS. KHANNA: Transcript, page 51, line 13 to 17.

Q. During your deposition, you were asked, "You, yourself, did not draw draft maps during the 2010 to 2011 redistricting process." You answered, "I'm not a cartographer."

"Question: So the answer is no," and you answered "right"?

A. Right. Thank you for refreshing my recollection. I appreciate it.

Q. You are not a member of the Privileges and Elections Committee in 2011; correct?

A. I am not, no.

Q. You attended no public hearings on redistricting; correct?

A. That's correct.

Q. And as of your deposition a few weeks ago, you had no reason to believe that Delegate Jones was the primary map-drawer; correct?

A. He was the patron of the legislation.

JUDGE PAYNE: She's asking about whether he was a primary map-drawer, although I'm not quite sure why that makes any difference.

Q. You said you met with Delegate Jones once about redistricting; correct?

A. Yes.

Q. That conversation lasted about 15 minutes?

[897] A. It may have.

Q. You never asked Delegate Jones to add or remove any particular precincts to your district; correct?

A. Not that I can recall, no.

Q. You never even discussed with Delegate Jones any specific precincts at all; is that right?

A. Not that I recall. I remember that we were moving, and certainly it would be of interest that our new home, which was only just a few miles away, would remain in the district. So I wanted to let him know that that was our family's impending move.

Q. You spoke about where your house is located.

A. That's correct.

Q. Never about any particular precincts?

A. Not that I recall, unless I was asked I would have responded.

Q. You never asked Delegate Jones to keep good Republican precincts in your district; correct?

A. I can't imagine I would say that. I'm willing to play the ball where it lies. I believe I could win in any district.

Q. You never asked Delegate Jones to make your district more Republican; correct?

A. No, I would never do that.

Q. You don't believe you ever looked at how District 97 was performing politically, either before or after redistricting; [898] correct?

A. No more than the average candidate for office would be interested in how his district performs, his or her district.

Q. You never told Delegate Jones you wanted to lose the Henrico portions of your district?

A. I would never say that, no.

Q. And you never suggested to Delegate Jones that he should change any other districts in any way; correct?

A. It would be presumptuous for me to suggest how he should do his business as patron of the legislation.

Q. You never discussed District 74 with Delegate Jones?

A. I can't imagine anything specific other than how my district might be drawn in the new map.

MS. KHANNA: Thank you, Delegate Peace. I appreciate your time. No further questions.

MS. McKNIGHT: I have just one, a few questions. I'll keep them limited, Your Honor.

REDIRECT EXAMINATION

BY MS. McKNIGHT:

Q. Delegate Peace, you've run for office in Virginia's off-year elections, haven't you?

A. I have.

Q. And about how many times?

A. Well, this is my seventh election, this sickle. I also am [899] the son of a former member of the Hanover Board of Supervisors who was the first woman elected in 1975 who served four terms and was a judge in the juvenile court in Hanover. I've been around politics my whole life, and I'm pretty well versed in the electoral process in Virginia.

Q. Now, I'd like to ask you a question based on your perception of running in races, in off-year races in Virginia's House of Delegates. Would you have used presidential election information from an even year to help you campaign in an odd year in Virginia?

MS. KHANNA: Objection. This is beyond the scope of cross-examination.

JUDGE PAYNE: I think it is. Sustained.

MS. McKNIGHT: Thank you, Your Honor. No further questions.

JUDGE PAYNE: This is a good try at resurrection, but she's right. The rules are the rules. All right, now, you have in the morning what, one witness or two?

MS. McKNIGHT: Your Honor, we have two witnesses. We have one fact witness who shouldn't take any longer than these fact witnesses today, and we also have one expert witness.

JUDGE PAYNE: That won't take long either.

MS. McKNIGHT: That's correct, Your Honor.

JUDGE PAYNE: And your rebuttal will have to come in in the morning, too.

[900] MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: If you have any.

MR. HAMILTON: We do, Your Honor.

JUDGE PAYNE: Are you sure you need any?

MR. HAMILTON: They're going to be very brief and focused on very narrow questions.

JUDGE PAYNE: All right, good. Thank you very much. We'll be in adjournment.

(End of proceedings.)

Transcript of Bench Trial, ***Bethune-Hill v. Va. State Board of Elections*** (Oct. 13, 2017)

[903] THE CLERK: Day four. Case No. 314-cv-852. ***Golden Bethune-Hill, et al. v. The Virginia State Board of Elections, et al. and the Virginia House of Delegates, et al.***

The plaintiffs are represented by Kevin Hamilton, Abha Khanna and Aria Branch.

The Virginia State Board of Elections is represented by Trevor Cox.

The Virginia House of Delegates is represented by Amy Tolbert, Mark Braden, Katherine McKnight and Richard Raile.

Are counsel ready to proceed?

MS. MCKNIGHT: Yes, Your Honor.

MR. HAMILTON: We are, Your Honor.

JUDGE PAYNE: Good morning. I know you like always to be on your toes and alert for changes so I'd like to tell you about a change that we'd like to impose on you all so you'll have some time during the morning break to sort through it.

I think we would like to hear maybe about ten minutes from each of you at the end of the presentation this morning sort of summarizing what you -- your positions are, what you think has been proved.

All right. Ms. McKnight, who is your next witness?

MS. MCKNIGHT: Yes. Thank you, Your Honor. One [904] brief administrative point. Yesterday you asked for a list of identifying exhibits that defendant-

intervenors have proposed and served on plaintiffs and to which plaintiffs have not objected. We have prepared that list. We've shared it with plaintiffs. We understand they do not object to the list. However, there are two exhibits in there that have been edited by agreement of parties. So plaintiffs need the opportunity to confirm that the versions of the exhibits you have are in compliance with the agreement. So --

JUDGE PAYNE: Your fine legal assistants will do that during one of the recesses, and they can come right up here and check it out.

MR. HAMILTON: So long as we have permission to approach the bench, yes, Your Honor.

JUDGE PAYNE: There's nothing secret up here, and if you can read any of our notes, you're really good.

MS. MCKNIGHT: And now, Your Honor, this list has not been prepared for filing. It's simply to help the court reporter or the court clerk transcribe the exhibits.

JUDGE PAYNE: All right.

MS. MCKNIGHT: Should I offer that now, Your Honor?

JUDGE PAYNE: Just hand it on up. Thank you, Mr. Roberts.

[905] MS. MCKNIGHT: Thank you, sir.

Your Honors, I'll like to call Delegate Stolle to the stand.

CHRISTOPHER P. STOLLE,

called at the instance of the defendant-intervenors, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MCKNIGHT:

Q Good morning, Dr. Stolle.

A Good morning.

Q Could you start by telling the Court which House district you represent?

A I represent the 83rd House District.

Q And for how long?

A Just about eight years now.

Q And aside from your role as a delegate, what is your profession?

A I am a physician.

Q And is your office in your district?

A Yes, it is.

Q Now, your district, before the 2011 redrawing, bordered House Districts 89 and 90; is that right?

A Correct.

Q Now, as a preliminary question, did you have any role in the 2011 redrawing process?

[906] A I was -- I was asked where I live, and I think that's about the only question I was asked in that process.

Q And now, what was happening in the south side/south Hampton area, population wise, when the map was redrawn in 2001?

A When the map was redrawn, Hampton Roads actually lost population in proportion to the rest of the state. So there was a district that was moved I believe to Northern Virginia.

Q Now, I'd ask the Court and, you, Dr. Stolle, to turn to page -- in Map Book No. 1, turn to Defendant-Intervenors' Exhibit 96 and 97, page 3.

JUDGE PAYNE: Do you have it?

THE WITNESS: Yes, sir, I do.

Q Now, on Defendant-Intervenors' Exhibit 96, page 3, does this look to you to represent your House district and its area prior to the 2011 redrawing?

A Yes, it does.

Q And on Defendant-Intervenors' Exhibit 97, page 3, does this appear to represent your district and the surrounding area after the 2011 redrawing?

A Yes, it does.

Q Now, for the Court to orient itself, would you mind looking on computer screen and using your finger, press a dot -- put a dot where your district was before redrawing [907] in 2011, and then in the other map, could you put a map on where your district was after?

Thank you. Now, while we're here, could you identify for the Court with another dot in old map which district was collapsed and moved out of this area?

And now, comparing the two maps, looking at your district how it compares, how did your district change in the 2011 redrawing?

A My district went primarily from a north/south orientation to a east/west orientation. I picked up a lot of communities along the Chesapeake Bay.

Q Okay. And do you think that the populations in the Norfolk area explains some of this change?

A I think that the 87 moving -- being moved out of that area certainly caused my district to move over in that direction.

Q And in your new district as drawn in 2011, does it make sense to you from the perspective of a community of interest?

A It does. The -- I have a lot more along the Chesapeake Bay right now. The communities have very similar issues, particularly with coastal flooding, erosion. And so I think that from a community of interest perspective, my district, right now, is better than it was before.

[908] Q And now, you campaigned for office in both 2007 and 2009, right?

A Correct.

Q And did you sense any shift in the political climate between 2007 and 2009?

A Absolutely. When I knocked on doors in 2007, it was towards the end of President Bush's term. Knocked on the doors, folks would say, I'm never voting for other republican. Two years later, change of administration, I'd knock on the same doors and they'd say, I'm never voting for another democrat. So I think the political winds had more to do with it than individual candidates.

Q Okay. And did you win election in 2007?

A No. I lost.

Q And you won election in 2009; is that right?

A Correct.

Q Okay. And when you campaigned, what election information was more useful to you, election

information from an odd year race or information from an even year presidential race?

MS. BRANCH: Objection, Your Honor.

JUDGE PAYNE: And it is?

MS. BRANCH: Eliciting improper expert testimony. She's asking him to testify about, you know, which election he thinks is most important, and I -- it's [909] to impeach experts who have already testified, it sounds like.

JUDGE PAYNE: So the objection is what?

MS. BRANCH: Eliciting --

JUDGE PAYNE: It's expert testimony?

MS. BRANCH: Yes.

JUDGE PAYNE: Overruled.

Q Would you like me to repeat the question?

A Please.

Q When you campaigned, what election information was more useful to you, election information from an odd year race or information from an even year presidential race?

A We -- we only use the odd year races. We don't look at the even year races. The turnout between the two races is so different that it's not really meaningful information for us in the odd years.

MS. MCKNIGHT: Thank you very much, Dr. Stolle. I have no further questions.

JUDGE PAYNE: Cross-examination.

CROSS-EXAMINATION

BY MS. BRANCH:

Q Good morning, Delegate Stolle.

A Good morning.

Q You testified that you didn't have a role in the redistricting process; is that correct?

[910] A That's correct.

Q You weren't a member of the Privileges and Elections Committee?

A That's correct.

Q And you weren't a member of the redistricting subcommittee, correct?

A That is correct.

Q You testified about some changes that were made to your district as a result of redistricting, correct?

A Yes, I did.

Q But none of those requests -- none of those changes were based on requests made by you to Delegate Jones; is that correct?

A That is correct.

Q For instance, you didn't ever discuss with him any relation between communities of interest and Virginia Beach and Norfolk, correct?

A That's correct.

Q You never discussed with him costal communities, for instance?

A That is correct.

Q And you also testified that the 87th House District was moved from South Hampton Roads to Northern Virginia, correct?

A I -- I know that it was moved from South Hampton [911] Roads. I'm not entirely sure where it was moved to. I think it was Northern Virginia.

Q Right. But you didn't know about that district moving while the redistricting process was going on, correct?

A That is correct.

Q You never discussed gaining any population from the 87th District with Delegate Jones; is that correct?

A That is correct.

Q At the time of the 2011 redistricting, you didn't know which districts in South Hampton Roads wore majority black; is that correct?

A I did not know.

Q And you've never communicated with any members of the Black Caucus who represent any of the districts that surround your district about redistricting, correct?

A That is correct.

MS. BRANCH: No further questions. Thank you.

JUDGE PAYNE: Any redirect?

MS. MCKNIGHT: No, Your Honor.

JUDGE PAYNE: Thank you for being us and giving us your testimony --

THE WITNESS: Thank you, sir.

JUDGE PAYNE: -- Dr. Stolle.

(Witness stood aside.)

[912] JUDGE PAYNE: Your next witness.

MS. MCKNIGHT: Your Honor, defendant-intervenors call Dr. Thomas Hofeller to the stand.

THOMAS B. HOFELLER, PH.D.,

called at the instance of the defendant-intervenors, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MCKNIGHT:

Q Good morning, Dr. Hofeller.

A Good morning.

MS. MCKNIGHT: I'd like to ask that Defendant-Intervenors' Exhibit 14, the first page, is shown on the screen.

A Yes.

Q And was this the report you submitted in this case in 2015?

A It was.

MS. MCKNIGHT: And I'd like to show the first page of Defendant-Intervenors' Exhibit 102 on the screen.

Q And is this the report you submitted in 2017 in this case?

A It is.

Q And you were admitted as an expert in this case in 2015, right?

A Yes.

[913] Q Dr. Hofeller, could you take a moment -- and I realize that this could be a very long answer, but could you take a moment to give the Court a brief summary of your experience in the field of redistricting?

A I'll try and keep it short here. I've actually been in the redistricting field for just a little bit over 50 years. I actually started in 1965. I participated in the redistricting process through five decennial censuses; 1970, 1980, 1990, 2000 and 2010. I've redistricted in places all over the nation and am familiar with the political geography pretty much in every state.

Q Thank you. And could you tell the Court what you were retained to do in this case?

A I was retained to look at and examine Dr. Rodden's report and comment on it.

Q Okay. And could you tell the Court what you were retained to do in this case in 2015?

A I covered the areas of compactness and contiguity. I might add one more thing, too. I did examine population shifts.

JUDGE PAYNE: When?

THE WITNESS: In 2015, Your Honor.

Q And could you tell the Court briefly what kind of experience you have in actually drawing redistricting plans?

[914] A I guess in my lifetime, I've probably drawn several hundred redistricting plans in various states, both congressional districts, legislative districts, county districts, municipal districts and -- that's really it, but many, many plans. And examined many plans.

Q And that is plans, not just single, stand-alone districts; is that right?

A Well, actually, single districts would be included in -- in every plan. But it's important always to examine a plan as a whole, not just one district at a time.

Q How difficult is it to draw an entire plan?

A It's a very intricate task, particularly for the lower house of a state legislature, because there's so many districts and so many different competing interests because of those districts. You have to examine the population shifts. You have to examine the demographics. You have to examine the political geography. You have to keep track of the other factors such as compactness, contiguity and -- well, that's a pretty good list, I think.

Q What kinds of issues do map drawers normally face when drawing or analyzing a map?

A Of course, as I stated somewhat before, drawing a map is a little bit different than examining it because you're actually creating a new map, and so you have to account [915] for all those factors which I mentioned before, plus the other interests of the party that is actually having you draw the map, be it the legislature or another political body.

Q Now, I understand you reviewed Dr. Rodden's report in this matter; is that right?

A Yes.

Q Okay. And are you familiar with the types of maps Dr. Rodden put in his report?

A Yes.

Q And could you --

A I've seen those types of maps for decades, actually. It's nothing new, as he stated, too, going back clear to the plague, or something like that.

Q And have you ever produced a map of the type that Dr. Rodden used in his report?

A Only for my own use. I find the maps to be interesting, but they don't have enough detail on them for me to actually either draw plans or to fully examine a plan.

Q I'd like to put up an example of one of his maps, Dr. Hofeller, if you can give me one moment.

So this is Plaintiffs' Exhibit 69, page 18. Do you recall seeing this map in Dr. Rodden's report?

A I do.

[916] Q And would you use this type of map to draw or analyze a redistricting plan?

A No.

Q And why not?

A Again, because there's not enough specificity of data. In order to know what the populations are and exactly where it is, you have to start counting dots, and that would be a process that would take many, many hours.

So for redistricting purposes, we would actually use a color thematic for one factor. And usually in the center of the unit of geography, be it a county or a voting district or a census block, we'd have data displayed in the center of that block. It could be several pieces of data, but one of them for sure would be the population -- the total population in the block.

Q Okay. And this map does not show you census block boundaries; is that right?

A Not this map, no.

Q Okay. And would you need census block boundaries to divide VTDs?

A Of course. Because blocks in a VTD are varying greatly both in population and in size and in the actual shape of the block. So you run into issues where one block may block your progress across the map or be too big. So you have to be very careful, when you're [917] splitting blocks, to actually find a place where it's both logical and where you're able to select blocks that will suit the purpose of dividing that unit up.

Q Based on your experience in redistricting, Dr. Hofeller, can you draw an ideal district for any delegate?

A Anybody could draw a district that the delegate would like, particularly the delegate. One of the problems you find in redistricting is that each incumbent thinks the plan should start from their district and emanate outward throughout the whole state. So they have an idea of what they want, but the problem with it is that it has to fit into a whole map which best satisfies all of the criteria for the whole plan. So you can't -- can neither draw such a map district by district in isolation from what's going on in the map or do a -- a robust analysis of that plan after the fact.

Q And drawing and passing a map is a legislative and political process; isn't that right?

A Well, it's usually a legislative process. In some states it isn't a legislative process. It's done by a

commission, in some cases by a court or a court master.

Q I see. And in reviewing Dr. Rodden's report for the types of issues that you've described this morning, did he take into account any of these various pressures on map [918] drawers?

A Not -- not as I read his report, no. He's merely interested in looking at each district one at a time, but he's not really bringing to bear all the pressures; particularly in this case, pressures which involve population shifts within the state, pressures which involve adherence to the Voting Rights Act, pressures which come from trying to maintain district cores, and other factors that come into play.

Q And are there any timing pressures related to the Voting Rights Act that were at play in this map in 2011?

A In Virginia, there was an extremely tight time frame for Virginia. Virginia, along with Texas, actually gets their census data first as it's released from about March 1st after the decennial census, so in the odd number -- the first year, which would be '01 or '91 or '81. And they have to draw these districts very quickly.

And then because Virginia was a Section 5 state, in the last time around, they have to prepare a fairly comprehensive submission to the Justice Department to get the map cleared or file a case in the D.C. District Court. So they are on a very short fuse.

MS. MCKNIGHT: Can we put up Plaintiffs' Exhibit 69, pages 36 and 37?

Q To illustrate one of the points you were just making, [919] Dr. Hofeller, I'd like to draw your attention to the last sentence on page 36 starting with, "The application of traditional redistricting principles," going on to the next page, "would have placed Colonial Heights, Virginia State University and Petersburg in the same relatively compact district and would not have segregated Hopewell."

Do you see that, Dr. Hofeller?

A Yes.

Q And in your review of Dr. Rodden's report, did you see him take into account the various and numerous pressures on map drawers related to traditional redistricting principles?

A No, I didn't. This may be his idea of what he thinks should go together, but it really has to be examined in the light of the whole plan.

Q And now, just to put this in context, did you account for all of these pressures in your own analysis in this case?

A Are you talking about this phase of the trial?

Q In both phases.

A I certainly took them into account in looking at the districts as they fit into the plan. Probably the -- the main pressure was the population shifts -- the relative population shifts across Virginia which necessitated the collapse of three districts and their resurrection in [920] Northern Virginia. There's a reason why districts are collapsed, and that's because if you don't collapse them, you have to elongate districts and stretch them way out, sort of like pulling

taffy, and if you stretch them out too far, like taffy, it will break.

So in order to create the least disruption on most of the districts, sometimes it's necessary to move districts. This causes a lot of turbulence in the boundary lines in both places where you add the districts and where you subtract the districts.

Q Dr. Hofeller, I'd like to ask you briefly about compactness issues in Virginia. First, have you ever lived in Virginia?

A Yes.

Q And during the time that you were living in Virginia, had you drawn redistricting plans?

A Yes.

Q Is it safe to say that you've become well-acquainted with Virginia geography and jurisdictions during that time?

A Yes. Maybe not as much as John Morgan has, but I lived in Virginia from 1981 to 1995 and then again from 1998 until 2014. So I have lived many, many years in Virginia.

Q And how --

[921] JUDGE PAYNE: The plans that you drew during the time you were living in Virginia, were they plans in Virginia?

THE WITNESS: I'm sorry. I didn't quite understand the --

JUDGE PAYNE: She asked you while you were living in Virginia, did you draw plans, and my question is were those plans drawn for Virginia elections?

THE WITNESS: No. They were drawn actually to support litigation and to examine for people who wanted me to examine the nature of the plans and determine what was going on in the map. If you've had all this experience, you know, over the years, just looking at a plan that way, you can make pretty good judgments about what was going on.

Q And how does Virginia's geography present challenges in computing compactness?

A Well, I wouldn't say it was actually computing compactness, but certainly the shapes in Virginia cause issues in compactness. There are a lot of river boundaries. The state has an irregular boundary. You also have trouble with compactness formulas on districts which border adjoining states. Because the way compactness is measured, it doesn't take into account the -- the land outside of the state when it's computing [922] the factors. Also, the counties have relatively odd shapes.

MS. MCKNIGHT: As a brief illustration, could we put up Defendant-Intervenors' Exhibit 97, page 3?

Q Now, Dr. Hofeller, does this map of the Hampton Roads/south side illustrate some of what you were just describing about the geography affecting compactness?

A I think it has to be taken in context with the Tidewater area, particularly the area south of the James River estuary and, of course, the ocean and the border of North Carolina, which means that all of the population issues of all the districts in that area had to be resolved at the eastern side of that territory.

MS. MCKNIGHT: You can take that down. Thanks, Amy.

Q In your review of Dr. Rodden's report, did you see where he conducted his own analysis of compactness issues?

A No. He opined on it, but I don't see any compactness data usually measured by common compactness tests.

Q As one illustration of this, could we turn to Plaintiffs' Exhibit 69, page 41? In the section of the Tidewater region, Dr. Rodden states that district were highly noncompact?

A Yes.

Q Is there any analysis in his report to back up that [923] assertion?

A Not that I saw. I think it's a -- it's a judgment on his part, but I don't think it's backed up with actual figures.

Q And would your answer be the same if I put up for you every time Dr. Rodden opined on compactness?

A Pretty much so. I think he may have used what is commonly called the eyeball test in making his judgments on compactness.

JUDGE PAYNE: What page is this that's on the screen?

MS. MCKNIGHT: Page 41.

JUDGE PAYNE: Thank you.

Q To tie this one off, you didn't see anywhere in Dr. Rodden's report where he calculated compactness or performed any kind of analysis regarding compactness; is that --

A I don't --

Q -- right?

A I don't recall seen it. Excuse me.

MS. MCKNIGHT: Okay. You can take that down, Amy. Thank you.

Q Now, we've heard testimony in this case that two districts were moved from the south of Virginia to the north of Virginia. Could you tell the Court how [24] population shifts in Virginia impacted map drawing in 2011?

A I believe it was three districts, actually.

Q And how would moving any districts to a different part of the state affect map drawing in the part of the state where the districts were removed?

A Well, where they're removed, of course, all the other surrounding districts have to move in to fill the void which is created by the district which has been moved. And in terms of one of the main goals, which was to preserve the cores of the existing districts, that has to be done very carefully or some districts will be very highly impacted in terms of their movement. So there are all sorts of competing population flows going on in those areas.

Q So why not just leave the districts there but move them out to grab population as they needed?

A Well, as I stated before, it would make the districts even less compact. And also, that type of a method competes with the other factors, the other criteria, which the legislature had set out to use.

Q And did you understand that the drawing of the plan was impacted by the plus or minus 1 percent population limit?

A Yes. That was an added complication on top of the [925] changes in relative population between the districts.

So at the beginning of the process, each decennial census, the current populations, the new populations of the districts, are calculated and the deviations from the ideal population are calculated so that you know where the districts are have too many or too few people.

But narrowing the allowable deviation from the ideal district size by half also creates further complications because if you had a higher deviation, you could actually resolve some of those population flow issues easier. So you might create some districts that are smaller and some districts that are larger. So since this was such a tight allowable population deviation, that added to the complexity of creating the new districts.

Q And how would that tight deviation range affect the number of VTDs that would be split in any district?

A In my judgment, it would probably cause more VTDs to have to be split, particularly in those areas where the districts had been removed or the districts had been added where you're much closer to that problem. As it radiates out into the other parts of the state, it isn't as big an issue.

Q Now, I'd like to turn to Table 12 in your original report.

MS. MCKNIGHT: This is Defendant-Intervenors' [926] Exhibit 14, and we're looking for Table 12.

Pardon me, Your Honor. This is on page 82 and 83 of your original report. And 84, it would seem. But let's keep these two pages on the screen for now.

Q Could you tell the Court what this shows?

A Yes. The first column, of course, is the district number, going from 1 to 100. And the next column is the -- what I call the core retention percentage, which is the part of the new district which was made up from the old district. So what portion of the old district showed up in the new district in terms of the new district's total population.

Those scores, of course, vary greatly. And you can see where certain districts have been collapsed, there's going to be a blank spot, which is actually a zero core retention. And where the new districts are added, you'll see a very low score also.

MS. MCKNIGHT: And could we put up pages 83 and 84?

JUDGE PAYNE: Excuse me. Where are these reports?

MS. MCKNIGHT: Oh, pardon me. This is Defendant-Intervenors' Exhibit 14.

JUDGE PAYNE: I know. I've got that. But where are these?

[927] MS. MCKNIGHT: These --

JUDGE PAYNE: You're using the 2015 report, right?

MS. MCKNIGHT: Yes. That's right.

JUDGE PAYNE: In this notebook that you all gave us?

MS. MCKNIGHT: Are you looking at the expert witness notebook?

JUDGE PAYNE: Yeah. The expert witness notebook. You've got Hofeller and then you've got a bunch of attachments, Exhibit 1. Are we in one of the exhibits or what?

MS. MCKNIGHT: It should be page 84, Bates number page 84 in that document.

JUDGE PAYNE: Okay. So if we just keep going with the numbers through the tabs, right? Page 80, what, 4?

MS. MCKNIGHT: Eighty-four.

JUDGE PAYNE: There. Thank you. Sorry.

A May I add something?

BY MS. MCKNIGHT:

Q Yes.

JUDGE PAYNE: Would you go back over that again because I was fishing for the exhibit.

MS. MCKNIGHT: Sure. No problem.

[928] THE WITNESS: Your Honor --

MR. HAMILTON: Well, I object to the witness just adding something without a question. I have no problem with --

JUDGE PAYNE: I asked her if she'd go back over it again.

MR. HAMILTON: That's fine.

JUDGE PAYNE: I thought.

MR. HAMILTON: Yeah.

BY MS. MCKNIGHT:

Q So, Dr. Hofeller, looking at pages 82, 83 and 84 of Defendant-Intervenors' Exhibit 14, this is Table 12 in your original report, could you tell the Court what this shows?

A Column 1, which is headed District, is the district number. Column 2, which says Core Retention Percentage, is, once again, the percentage of the new district that is made from population that was in the old district. Column 3, which is African-American Majority, is really a flag with a 1 in it that identifies that as a majority district -- minority district. And the last column brings that figure over from column 2 to column 4 so I could actually calculate the difference in core retention between the plan as a whole and the African-American districts.

[929] Q And now, when you talk about core retention, are you talking about retaining people or land?

A People.

Q And now, you have a note on page 84 of your report. What does this note offer the Court?

A This was a result of my analysis of the table, and I said that three districts should be considered to have been collapsed, which were 2, 10 and 87, which, of course, had zero retention, and that the core -- average core retention across the 10 districts was 67.9 percent. For the 97 districts which were not collapsed, the average retention rate was 69.09 percent. And for the 12 African-American majority districts, the core retention was 72.76 percent.

Q And so --

A So the African-American districts had a higher core retention rate than the rest of the plan.

Q Now, did you hear testimony by Dr. Palmer earlier this week that the best predictor of whether a VTD was placed in a challenged district was whether or not it had been in the benchmark version of that district?

A Yes.

MR. HAMILTON: Objection, Your Honor. Beyond the scope of his expert report. This expert, by his own testimony this morning, was hired -- retained to comment [930] on Dr. Rodden, not Dr. Palmer.

MS. MCKNIGHT: We'll drop it, Your Honor.

JUDGE PAYNE: There's --

MS. MCKNIGHT: There's no need.

JUDGE PAYNE: Just a minute. You don't need to finish.

MS. MCKNIGHT: We'll drop.

JUDGE PAYNE: She's not going to pursue the inquiry.

MR. HAMILTON: Thank you.

MS. MCKNIGHT: Thank you, Your Honor. No further questions. Thank you, Dr. Hofeller.

THE WITNESS: You're welcome.

JUDGE PAYNE: What did you say, D. Hofeller?

THE WITNESS: You're welcome.

JUDGE PAYNE: Oh.

CROSS-EXAMINATION

BY MR. HAMILTON:

Q Good morning, Dr. Hofeller.

A Good morning.

Q Dr. Hofeller, you've never been employed as a faculty member in any university or college, have you?

A That's true.

Q And you have not published a great deal of scholarly articles or peer reviewed studies, correct?

[931] A That's true.

Q You testified during the first trial about Dr. Ansolabehere's racially polarized voting analysis. Do you recall that?

MS. MCKNIGHT: Your Honor, I'd object as being beyond the scope of direct.

JUDGE PAYNE: She didn't ask about that that I noted, Mr. Hamilton. Time for you to drop now.

MR. HAMILTON: I will.

Q The -- you, in your experience in drawing maps, are aware of the restrictions imposed by the Voting Rights Act, correct? You testified about that a moment ago?

A I've dealt with them through many decades, yes.

Q You agree with me that Section 5 of the Voting Rights Act does not require the maintenance of a rigid black voting age population percentage in majority minority districts, correct?

MS. MCKNIGHT: I'd object, Your Honor, again. This is beyond the scope of direct. I asked him about timing issues related to the Voting Rights Act. I did

not ask him about any particular requirements for BVAP levels.

MR. HAMILTON: I think it's fairly within the scope, Your Honor. She brought it up.

JUDGE PAYNE: Bringing up a topic doesn't open up the whole door, particularly if she restricts. I don't [932] think that she covered that.

BY MR. HAMILTON:

Q Dr. Hofeller, you've worked for a number of republican organizations over the years, haven't you?

A Yes.

Q You were a consultant to the National Republican Congressional Committee for the 1990 redistricting cycle?

A Yes.

Q And the redistricting director for the Republic National Committee from 1999 to 2003?

A Yes.

Q And then -- I'm not to be difficult here with the dates --

A No. I'm just trying to remember.

JUDGE PAYNE: If that's on his resume, do we need to go through that?

MR. HAMILTON: I think we do, Your Honor, but I'm moving on.

Q Since the time you've -- and then you've been a redistricting consultant for the Republican National Committee from 2009 to the present, correct?

A That's correct.

Q And since then, you've been a private consultant working or various republican candidates and campaigns and committees, correct?

[933] A I think the way you worded your question, I haven't actually worked in campaigns.

Q Okay.

A Maybe you want to ask that again.

Q Sure. You've been a private consultant working with various republican candidates and committees?

A Again, I don't really think I've worked with candidates.

Q Mostly just the committees?

A I've worked with organizations usually.

Q Okay.

A Either governmental or nongovernmental.

Q And mostly on the republican side?

A Yes.

Q In fact, exclusively on republican side?

A In that time period, yes.

Q You have a company called Geographic Strategies, correct?

A I do.

Q And your partner in that is one of the lawyers here in the courtroom, Dale Oldham; is that right?

A Correct.

Q You've invoiced Mr. --

MS. MCKNIGHT: Your Honor, I'd object. This is going way beyond what plaintiffs' counsel would need to [934] address credibility or the weight of the

evidence, testimony that Dr. Hofeller is going to provide. It's not clear where he's going. He's asked a number of question after telling you that he only needed a few more to get to his point.

MR. HAMILTON: The point, Your Honor.

JUDGE PAYNE: Of that's true, but the particular question at issue I think is a question that he can ask about. It has -- it's probative of bias.

Q In fact, your partner in that company is one of the lawyers that's right here in the courtroom, Dale Oldham; isn't that right?

A Yes.

Q You've invoiced Mr. Braden more than $57,000 for your work in connection with this case, Bethune-Hill; isn't that right?

A I believe that's correct.

Q Okay. You mentioned on direct that you have been involved in redistricting in a number of states over the course of five decade, I think. Is that accurate?

A Yes.

Q And just in the 2010 cycle, you were involved either in preparing for redistricting or redistricting itself or after-the-fact litigation in Florida, Maryland, Virginia, Mississippi, Arizona, Missouri, Nassau County, New York, [935] Texas and North Carolina. Is that accurate?

A I don't actually remember Florida, but I think the rest of the list is accurate, yes.

Q Thank you. Your work on redistricting has been described as describing wombs for his team and tombs for the other guys?

MS. MCKNIGHT: Objection, Your Honor. I don't see the relevance. It sounds like hearsay. I don't know that this is even relevant to this case. I'm not sure where plaintiffs' counsel to trying to go.

JUDGE PAYNE: I think he's trying to show where he's heading, what his bent is, as I recall. Is this some advertisement from his firm? Because if it is, you can put it in. But if somebody's comment -- for instance, if I wrote or the Richmond Times-Dispatch wrote, then you can't get in. That's not relevant, inadmissible and it is hearsay.

MR. HAMILTON: It would be if I --

JUDGE PAYNE: It can't even be considered on direct it's so 403 ridden because it opens for a lot of other information. Now, if he said it or it's on his website, have at it. Otherwise, leave it be, if you would, please.

MR. HAMILTON: I'm not offering any hearsay article or magazine. I'm asking him if his work has been [936] described as wombs for his team --

JUDGE PAYNE: I think I understood what the question was when the ruling was made. If you'll just go to the next question, that would be good.

MS. MCKNIGHT: Your Honor, was the objection sustained?

JUDGE PAYNE: I guess I used too many words.

MS. MCKNIGHT: No. Thank you. Just for the record.

JUDGE PAYNE: Sustained.

Q What you've said in your presentations, "Beware of nonpartisan or bipartisan or staff bearing gifts. They're probably not your friends." That's what you've said in your presentations, isn't it?

A I did in one presentation, yes.

Q Now, in your expert report, you've attached a couple of maps from North Carolina's 12th Congressional District from 1992 to 2001, correct?

JUDGE PAYNE: Which report, Mr. Hamilton?

MR. HAMILTON: I think it was Defendant-Intervenors' Exhibit 14, maps 1 and 2.

JUDGE PAYNE: Thank you, sir.

A That's the 1992 redistricting -- actually, I didn't play a part in that. I actually testified in the court case which challenged it.

[937] JUDGE PAYNE: I think the question was did you attach that to your report, wasn't it, Mr. Hamilton?

MR. HAMILTON: That was, Your Honor.

THE WITNESS: Yes, Your Honor, I did. I'm sorry.

JUDGE PAYNE: All right.

Q And you attached two maps. One was from 1992, and the other was from 2001; is that right?

A Yes.

Q What you didn't include was a copy of North Carolina's 12th Congressional District from 2011, right?

A That's true.

Q And you're familiar with that district because you actually helped to draw it in 2011; isn't that right?

A The plan, you mean?

Q That particular district.

A Oh, I'm sorry. I don't know which district you're identifying.

Q The 12th Congressional District of North Carolina.

A Yes.

Q Okay. You worked really closely with Delegates Rucho and Lewis in designing the congressional plans in North Carolina that year?

MS. MCKNIGHT: Objection, Your Honor. Again, I'd ask what relevance this has to this case and the maps [938] that are included in his report. He's already testified he didn't include the 2011 map in his report.

MR. HAMILTON: And, Your Honor, it's a calculated omission, I think.

JUDGE PAYNE: Why don't you just ask him if it's a calculated omission and if so -- or why he omitted it maybe.

MR. HAMILTON: Well, it's cross-examination. I'd prefer not to ask a "why" question. I think I know what the answer is.

JUDGE PAYNE: Well, I understand that, but you need to get to the point, I think, because in getting to the point, you're getting off base I think is her objection, and she's right.

Q You testified in court in the Cooper v. Harris case in defense of Congressional District 12 in North Carolina just last year, didn't you?

MS. MCKNIGHT: Again, Your Honor, that is related to a 2011 map. The maps that have been attached to Dr. Hofeller's reports do not include the 2011 map.

JUDGE PAYNE: Well, I understand that, but that's a different question now. Overruled. Did you testify in support of the 12th Congressional District map that was used in Cooper v. Harris in 2011?

THE WITNESS: Yes.

[939] Q And that was the map that you had drawn?

A Yes.

Q And the Court concluded that race had predominated in that case; isn't that true?

A Yes.

Q Now, in Virginia you didn't actually draw the map; is that right?

A That's true.

Q Okay. You mentioned compactness a moment ago in the direct examination. Are you aware that the parties have stipulated to the compactness scores of the districts in this case? It's no longer at issue?

A No.

Q All right. Dr. Hofeller, the Commonwealth of Virginia uses voting tabulation districts as a basic unit of geography, correct?

A It's the basic unit of geography, yes. In most states, actually.

Q And it's true that, relatively speaking, there are very few VTDs that are split in a given state during the course of redistricting, right?

A It varies from state to state.

Q One reason to split a VTD might be to equalize population to satisfy the one person, one vote principle, right?

[940] A Yes.

Q Another reason to split a VTD might be because of an incumbency?

A Yes.

Q Another reason might be to maintain the core of a benchmark district?

A Yes.

Q And looking at split VTDs can be informative depending on how you use them and how you analyze them; isn't that true?

A Yes, depending on how you use them and analyze them, yes, to a certain degree.

Q So let's talk for a minute about dot density maps like those prepared by Dr. Rodden. I take it you've seen those kinds of maps before?

A I've even produced them, yes.

Q Okay. And in your first supplemental report, that's the 2017 report, you explain that one of the reasons you've rejected these kinds of maps is because, quote, The maps are difficult for many line drawers to understand and to grasp the information required for

actual line drawing, closed quote. That's included in your report, right?

A It is.

Q Of course, you're not suggesting that this court can't understand or grasp the information presented in [941] that -- in those maps, are you?

A Well, I think that's really their decision, not mine.

Q Okay. And putting aside your objections to dot density maps as a category, if one were to create a dot density map, there's nothing methodologically wrong with the way that Dr. Rodden prepared those dot density maps in his report, right?

A That's true.

Q Now, it's fair to say that it's your opinion that a court would get a better level of comprehension using a map that was shaded to show racial data rather than using the dot density format. Is that fair?

A That would be my preference, certainly.

Q And, of course, a court evaluating a map, like those before us, could use both a shaded map like the ones provided by Dr. Palmer and a dot density map like the ones provided by Dr. Rodden, right? It's not an either/or. They could use both, right?

A I'm not sure that I remember what Dr. Palmer's maps looked like.

Q And you'll agree with me that dot density maps provide a court with some relevant information. We might argue about how much, but there's some relevant information there, right?

A It's descriptive of the geography in terms of the [942] factors that it has on it, yes.

Q And to be clear, we can look through your reports all day long, and you haven't provided the Court with either dot density maps or shaded population density maps, correct?

A That's true.

Q Now, just a couple more questions. You'll agree that the census information available to the legislature included, among other things, population by census block?

A Yes.

Q And it also had race and ethnicity data again down to the census block?

A Yes.

Q In Virginia, there's no political party registration, true?

A True.

Q So political party registration is not available at any level, VTD or block?

A Correct.

Q In Virginia, election results are reported by the state election officials either at the state or local level by voting tubulation district, correct?

A Yes.

Q And then a VTD is composed of smaller units we've heard described in this trial as census blocks, right?

[943] A Yes.

Q So let's imagine, hypothetically speaking, that you have a VTD with 10 census blocks in it. We could know, if we wanted to, how the VTD as a whole voted in any given election, right?

A Certainly.

Q And that data is available at the VTD level?

A Yes.

Q What you can't do at the census block level is determine any political differences between different census blocks, putting aside rounding errors. The political data is just going to treat them exactly the same?

A From that political data that is given, yes.

Q In other words --

A There could be ways to do it, but --

Q In other words, it treats all the census blocks exactly the same?

A Again --

JUDGE PAYNE: Excuse me. What's the "it" in that sentence -- or question? Excuse me, Mr. Hamilton. "It treats it the same." What is the "it"?

MR. HAMILTON: If we -- the political data. I'm sorry. It's an inartfully phrased question. Let me ask it again.

[944] Q Political data is report at the VTD level. I think we've already established that. All you can know at the census block level is going -- the census block level is going to treat -- other than rounding errors, it's going to treat each census block exactly the same within that VTD because that's the information that's reports; isn't that true?

A Except for rounding errors, yes, it would be, as if all the blocks were the same as the voting district as a whole.

Q Okay. So we can't make distinctions in that hypothetical 10 census block VTD. It's going to treat number 1 the same as number 7 and number 3 the same as number 9?

A Not with the methods we use in this decade. There are methods by which it could be done.

Q All right. But not -- not here, at least as far as you know? Not in Virginia in 2011?

A That's true.

Q In your supplemental report you conclude, on -- in paragraph 20, and I'll just read it. "Drawing conclusions regarding HB 5005, without the production of an accompanying completely new, statewide sample plan, accompanied by a block assignment file, does not allow added substantial value to a discussion of the issues [945] involved in this case Simply stated, Dr. Rodden's report does not document how his objections would change the configuration of HB 5005. Because of this, the report cannot substantiate the conclusions Dr. Rodden reached."

That's in your conclusion of your supplemental report, correct?

A You've stated what I said, yes.

Q And in the North Carolina litigation, the Cooper case you were involved in, you know the state of North Carolina took the same position; that it was necessary for the plaintiff, in a racial gerrymander case, to

produce an alternative map to prove their case. You know that, right?

MS. MCKNIGHT: Your Honor, I'd object. He's asking about what's required in the case. This expert is not a lawyer. He's not here to opine about what's required in these cases.

MR. HAMILTON: Except that he just did in conclusion to his report, and I think I'm entitled to cross-examine him on it.

JUDGE PAYNE: But there's a difference between what someone is required to do by law, which has the Supreme Court has held -- in this case, I think -- that an alternate map is not required. There's quite a difference between that and whether an expert, in evaluating another [946] expert's report, says that report is useless or of limited utility because it lacks such a map. So you were linking the legal and the opinion, and her objection is sustained as to the form of the question.

MR. HAMILTON: Thank you, Your Honor. Thank you, sir. No further questions.

MS. MCKNIGHT: Thank you, Your Honor. Just a few questions on redirect.

REDIRECT EXAMINATION

BY MS. MCKNIGHT:

Q Dr. Hofeller, did you hear plaintiffs' counsel say a number of times that each census block is treated the same? Did you hear him say that?

A Not quite that. But yes, something very similar.

Q And the number of the people is different in each census block; isn't that right?

A That's correct.

MS. MCKNIGHT: Thank you, Dr. Hofeller. I have no further questions.

JUDGE PAYNE: Mr. Hamilton, so I can make my notes correspond to the exhibit, what paragraph were you asking him about in his report? I thought it was paragraph 20 and it's obviously not. The last question that you were asking about a map and his assessment of Dr. Rodden's report.

[947] MR. HAMILTON: Paragraph 21, page 7 of Dr. Rodden's first supplemental declaration. That's his 2017 report, sir.

JUDGE PAYNE: Oh, it was 7.

MR. HAMILTON: That's from Dr. Hofeller. Hofeller.

JUDGE PAYNE: It's the '17 report?

MR. HAMILTON: Correct.

JUDGE PAYNE: I'm sorry. I had the wrong report. Thank you. All right. Can Dr. Hofeller be excused?

MS. MCKNIGHT: Yes, he may, Your Honor.

JUDGE PAYNE: Thank you very much for being with us and giving us your testimony, sir. You may be excused.

THE WITNESS: You're welcome.

(Witness stood aside.)

JUDGE PAYNE: Any other evidence by the defendants or intervenor-defendants?

MS. MCKNIGHT: No, Your Honor. Defendant-Intervenors rest.

JUDGE PAYNE: Rebuttal.

MR. COX: Your Honor.

JUDGE PAYNE: Excuse me.

MR. COX: Defendants do not have any additional case to present. But for the record, we join the [948] arguments raised by defendant-intervenors.

JUDGE PAYNE: The evidence?

MR. COX: Correct. Yes, Your Honor. The evidence.

JUDGE PAYNE: All right.

MR. HAMILTON: And, Your Honor, our witness appears to be momentarily indisposed. If I can be excused for a moment, I think I know where to find him.

JUDGE PAYNE: Well, do you have another witness? We can give that -- give him a reasonable break. Does it make any difference what order you put them on in?

MR. HAMILTON: No, it doesn't.

JUDGE PAYNE: Okay. Go ahead with your other one. Who's going to do that, Ms. Khanna or her Ms. Branch?

MS. BRANCH: Your Honor, the plaintiffs call Senator McClellan to the stand.

JUDGE PAYNE: Here comes a witness. Is this the witness you wanted?

MR. HAMILTON: That is. Yes.

JUDGE PAYNE: If Senator McClellan is going to be short and you can let her go, maybe it's better to do her now. Would you prefer that, Senator McClellan.

SENATOR MCCLELLAN: Yeah.

JUDGE PAYNE: Okay. Come on.

[949] MR. HAMILTON: Well, thank you, Your Honor, for –

JUDGE PAYNE: That's called an air ball.

THE CLERK: Shall we swear her again?

JUDGE PAYNE: Yes because she was excused.

JENNIFER MCCLELLAN,

called at the instance of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BRANCH: May I proceed?

JUDGE PAYNE: Please.

BY MS. BRANCH:

Q Good morning, Senator.

A Good morning.

Q Intervenors played a video of a house floor statement made by Delegate Spruill during the 2011 redistricting process. I'd like to ask you a few questions about that. Was Delegate Lionell Spruill the chair of the Black Caucus in 2011?

A No.

Q Has he ever been the chair of the Black Caucus?

A No.

Q When one member of the Black Caucus makes a statement on the House floor, does that person speak on behalf of [950] the entire caucus?

A No.

Q Do you know what Delegate Spruill's position was on the 55 percent BVAP target?

A Yes.

Q And what was it?

A Delegate Spruill believed you needed a large percentage to ensure that a black candidate -- a large percentage of black voting age population in a district to better ensure that a black candidate would be elected.

Q And in your opinion, was Delegate Spruill an outlier from the rest of the Black Caucus on that issue?

A Yes.

Q Intervenors' counsel has indicated that you testified that VTD 703 was split to preserve a community of interest. Were you involved in negotiating the precinct 703 split in your district?

A Yes.

Q And did you want to split it?

A No.

Q Why was it split?

A In order to get the numbers for my district and the 70th to 55 percent BVAP and one percent population deviation, it needed to be split.

Q And did the split of precinct 703 have anything to do [951] with the addition or making whole a precinct 208 in your district?

A Yes.

Q How so?

A Well, to equalize the number of votes that came in from 208, that made it difficult to then pick up all

of 703 in the 71st District. But if you put all of 703 in the 70th District, then the BVAP for 71 would go down.

Q And was precinct 208 majority white?

A Yes.

Q You testified that precinct 703 is a split on a natural boundary line. What natural boundary line is that?

A A major street.

MS. BRANCH: No further questions. Thank you.

JUDGE PAYNE: Any questions?

CROSS-EXAMINATION

BY MS. MCKNIGHT:

Q Good morning, Senator McClellan.

A Good morning.

Q Just a few questions for you. You would agree, wouldn't you, that reasonable minds can disagree as to whether -- as to the application of a 55 percent BVAP goal?

A Yes.

[952] Q And did you ever say on the floor that you disagreed with using a 55 percent BVAP goal?

A No.

Q And did you ever tell Delegate Jones that Delegate Spruill did not speak for you?

A No.

MS. MCKNIGHT: Thank you, Senator McClellan. No further questions.

JUDGE PAYNE: Can she be excused permanently?

MS. BRANCH: Yes, she may, Your Honor.

JUDGE PAYNE: Thank you for being with us --

THE WITNESS: Thank you.

JUDGE PAYNE: -- Senator McClellan. You may go about your business.

THE WITNESS: Thank you.

(Witness stood aside.)

MR. HAMILTON: Plaintiffs call Dr. Rodden to the stand.

JUDGE PAYNE: Dr. Rodden, you haven't been excused. I remind you you're under the same oath which you took earlier in these proceedings.

JONATHAN RODDEN,

called at the instance of the plaintiffs, having been previously sworn, testified as follows:

DIRECT EXAMINATION

[953] BY MR. HAMILTON:

Q Good morning, Dr. Rodden.

A Good morning.

Q We've heard some testimony about the availability of political data at the census block level. And I don't actually think there's much dispute, but I just want to make sure we're clear about that. Vote share by elections in the Commonwealth of Virginia is reported at the voting tabulation district level; is that right?

A Yes.

Q So is it possible to de-allocate that vote share to the census block level, or if you do that, what do you get?

A One simply spreads those votes.

JUDGE PAYNE: Wait a minute. Those are two questions, and I think I'd like to hear them separately, if you don't mind.

MR. HAMILTON: Sure.

Q Is it possible to de-allocate the vote total or vote share at the VTD level down to the census block level?

A Yes.

Q And if you do that, what do you get?

A One simply spreads those votes from the VTDs into the blocks evenly according to population. So, in other words, one takes 60 percent democratic vote share and [954] simply spreads those votes evenly across the blocks. That's what the Maptitude software does when one inputs VTD level, political data and wants to examine it at the block level.

Q Does that actually reflect the vote share within those census blocks that were actually cast in those census blocks?

A No.

Q Why not?

A Because we don't have any data at the block level, we're simply imagining -- we're making an assumption that democrats are evenly distributed throughout the VTD. When I say "we," I mean anyone using Maptitude.

Q And would that be a fair assumption or an accurate assumption?

A Not in my experience, no.

Q And why not?

A Because democrats and republicans tend to be -- tend to live in different parts of VTDs in many cases.

JUDGE PAYNE: What's that?

THE WITNESS: Democrats and republicans are not evenly distributed within VTDs in many cases. They can be clustered by neighborhood. Say if the VTD has a railroad track running through it or there's a different type of neighborhood on one side of that track or highway or [955] whatever it might be, then we can receive very different political behavior on different sides.

Q Maybe this is a different way. Let's imagine a world in which election results were only reported by legislative districts, like so the whole House District 71 was reported just at that level. Would that tell you anything about which VTDs were more democratic or less democratic than other VTDs?

A No.

Q Is that sort of same thing that's happening here, just at a smaller level?

A Yes. The problem is when we try to disaggregate something where we don't actually have the disaggregate data, we have to make some really bold assumptions.

Q And we've seen in this case some pretty significant differences in the political performances of different VTDs within these specific challenged districts; is that right?

A Yes.

JUDGE PAYNE: Excuse me. You're making bold assumptions to do what, now?

THE WITNESS: If I want to take VTD-level election results and assume that every census block within that VTD exhibits the same political behavior, I consider that to be a bold assumption.

[956] JUDGE PAYNE: What does a bold assumption mean in your world, in terms of how useful it is? In my world, a bold assumption is not of any utility. I'm curious about in your world, what -- of what utility an assumption of that nature is?

THE WITNESS: Yes. Sometimes it's useful to make an assumption if we have no other alternative.

JUDGE PAYNE: You mean even a bold assumption?

THE WITNESS: Sometimes. So in this situation, what is happening is someone is sitting at a computer and, as we saw in those demonstrations, moving around census blocks. And one wants to then add up the votes for democrats and republicans in the new district. So one doesn't want to get an error, one doesn't want to get a message that says I don't know how many democrats there are, one wants a number even if that number is based on a bold assumption.

JUDGE PAYNE: What's wrong with just accepting the fact that we don't know and living with that in whatever analysis that needs to be made, whether in the legal world or your world?

THE WITNESS: The -- what's wrong with making the assumption?

JUDGE PAYNE: What's wrong with accepting the fact that you shouldn't make an assumption except for

[957] generally accepted reasons and leaving it be and doing the analysis without considering the bold assumption that you make --

THE WITNESS: Because if we didn't make --

JUDGE PAYNE: -- in your world.

THE WITNESS: -- any assumption -- if I was in the role of Dr. -- of Mr. Morgan and I was drawing a district and I wanted to report to Delegate Jones the political values -- the democratic performance score associated with a district that I had just created that I was proud of, I wanted to say, This is the score of this district and that district had some --

JUDGE PAYNE: That's not what I asked you. I asked you in your world, in your analysis, that's wrong with just accepting that a bold assumption cannot be made and you ought to use the tools that you do have instead of assuming?

THE WITNESS: In my work, in my report, I didn't make any assumptions about -- about this. This -- I was asked about how --

JUDGE PAYNE: I take it that you can't answer the question about whether you should do it or not do it? You just shifted from whether you should or could to whether you did, and those are two different questions.

THE WITNESS: If I was trying to draw districts [958] and report to someone the political score for that district, I would need to make that assumption in order to report a score. Otherwise, I would say I don't know because the VTD was split. I don't know how many democrats are in my new district that I just created because the VTD was split.

JUDGE PAYNE: All right.

THE WITNESS: So if I want that score --

Q Let me ask a clarifying question or two. That assumption is just wrong, isn't it? The assumption that democrats and republicans are evenly split?

A Yes.

Q And, in fact, Judge Payne is correct. We don't actually know. And so for the purposes -- if you really -- if you had to put your hand on that Bible and swear how many democrats, how many republicans are in that census block, you'd have to say I don't know?

A Correct.

Q Because none of us do?

A Correct.

Q And if Maptitude generates something, it's just diluting you because it's not an actual real value that has any data that's reliable beneath it?

A Because you want a number, and it gives you a number based on an assumption.

[959] Q That's wrong?

A Correct.

Q All right. Let's -- let's move on to census block geography. We've heard testimony that the geography of these census blocks and the size and shape and placement of them imposed meaningful restrictions in how these VTDs were split. Do you recall hearing that?

A Yes.

Q Is that true?

A No. The census blocks are very small, and there are some of them and quite -- and many of them along the relevant borders. So the number of options that one had in splitting those VTDs were very, very high. A very large number of options, very few constraints.

Q And how do you know that?

A I've explored the data. I've stared at the VTD and block boundaries and tried to -- tried to think about all the different ways that these VTDs could be split.

Q And when you did that, you were able to look at the same maps you generated but with the VTD boundaries along --

A Yes. The only reason I didn't include the VTD boundaries in all of the maps is because it's an esthetic decision. We -- the human eye can only take in so much information, and if I had placed all those block [960] boundaries on the map, it would have been overwhelming. They were already, I think, very difficult to see. We had trouble squinting at the VTD names and so forth. I couldn't have put all that additional ink on the map.

Q So let me ask you this. Does the geography or the size, shape and placement of those census blocks require that VTDs be split along racial lines?

A No.

Q All right. There were some questions about House District 80. And maybe we can call up for a moment illustrative 58, House District 80.

JUDGE PAYNE: This is Plaintiffs' Exhibit 69?

MR. HAMILTON: That's correct, Your Honor. And page 53, it's Figure 18. And in the illustrative notebook that I had prepared at the beginning, it's on page 58. That's just a larger image of the same document.

Q This -- we heard some testimony about a delegate name Johnny Joannou? Did you recall hearing that?

A Yes.

Q And I believe -- he was the incumbent in which district?

A Seventy-nine.

Q And can you -- is the location of his residence plotted on this map?

A Yes. It's the yellow dot.

[961] Q Can you circle it?

A It is located in the VTD numbered 35.

Q Okay. That's sort of, more or less, dead center of this map; is that right?

A Yes.

Q He lived -- so is that -- that's the north side of the -- that the Elizabeth River there?

A Yes.

Q When he was challenged in a primary in 2009 just before redistricting, how did he do in precinct 35?

A That was his home, his home precinct. He got a large majority.

Q Okay. How about precinct 34, immediately next to his district?

JUDGE PAYNE: What year are we talking about, Mr. Hamilton?

MR. HAMILTON: 2009.

JUDGE PAYNE: Thank you.

A That's right next to his home, and he also got a large majority in that precinct.

Q And how did he do in precinct 38? That's the next one moving north.

A Also a comfortable majority.

Q And then how did he do in Taylor Road?

A The same.

[962] Q And how did he go in Yeates?

A The same.

Q And these are all -- excuse me. This is in a democratic -- pardon me, Your Honor.

JUDGE PAYNE: Get some water if you need it.

MR. HAMILTON: That's okay. I think I'm all right, but thank you.

Q This is in a democratic primary in 2009; is that right?

A Yes.

Q What happened to all four of those precincts?

A They were moved into District 80.

Q So they were taken out of his district, Johnny Joannou's district?

A Yes.

Q And then what happened in the primary election in 2013?

A He was defeated.

Q And who did he lose to? Where did that candidate come from?

A That was a candidate from the other side of the Elizabeth River.

MR. HAMILTON: Thank you, sir. No further questions.

JUDGE PAYNE: Cross-examination.

[963] CROSS-EXAMINATION

BY MR. BRADEN:

Q Good morning.

A Good morning.

MR. BRADEN: If we could bring up the demonstrative.

JUDGE PAYNE: What demonstrative is it?

MR. BRADEN: And it is -- do we have a number on it?

JUDGE PAYNE: Was this one of the ones that was excluded on objection?

MR. BRADEN: No. It is not --

JUDGE PAYNE: This is the one that was admitted?

MR. BRADEN: This is the one that was admitted.

JUDGE PAYNE: All right.

MR. BRADEN: This one was used by Mr. Morgan. He was disusing Mr. Morgan. I wanted to ask him --

MR. HAMILTON: Before you do that, just for the record, this was not admitted. This is an illustrative exhibit so it's not part of the record. I just want to

make sure that's clear. I think counsel may have just misspoke.

JUDGE PAYNE: Yeah, I think so. It's an illustrative exhibit. It was -- or a demonstrative, and it was not admitted. It was used to help Delegate -- [964] Mr. Morgan in his testimony.

Q And I believe you just testified to how the software that was used by Morgan and was used by Delegate Jones would, during this process, deaggregate election data out to census blocks, correct?

A Yes.

Q And then -- so that would then create a screen, a number, when you move the census blocks, out for all the political values contained in the little box here?

A Yes.

Q So when I move -- when I divided a VTD in two pieces and put one into, say, District 10 on the map here, correct, that would then show the Obabma vote versus -- the democrat versus republican vote in all of those categories? It would change and show a different value?

A When a VTD was moved?

Q Yes.

A Yes.

Q And if I had the obligation to present a plan to a delegate to attempt to convince him to vote for that plan, do you think that data would be of importance?

A I believe so.

Q So the process, then -- do you have any reason to believe many delegates would understand the

deaggregation being possibly challengeable by a statistician like [965] yourself?

A Do I believe that the delegates would be concerned about --

Q Do you think they would understand your position that this is not the best data available -- I mean may have some data questions?

A No. They would like to have a number. That's why the software produces one for them.

Q And so this number is very important -- am I correct -- would you view this number important to achieving the political goal of getting the plan passed?

A Yes.

Q How large can census blocks be, in population numbers?

A There's a range. I think they sometimes can be as high as a thousand.

Q So a census block with a thousand persons in it total pop would be larger than the 1 percent range in the -- the range here would be -- the variation is 1 percent plus or minus. So would a census block of a thousand person alone be enough if you had perfect population? If you moved one census block of a thousand people, it would take it out of the population range, right?

A Yes.

MR. BRADEN: No further questions.

[966] JUDGE PAYNE: Any redirect, Mr. Hamilton?

MR. HAMILTON: Just briefly.

JUDGE PAYNE: I thought you were going to surprise any.

MR. HAMILTON: What's that?

JUDGE PAYNE: I thought we weren't going to have any for a minute.

MR. HAMILTON: I have no notes, Your Honor.

REDIRECT EXAMINATION

BY MR. HAMILTON:

Q This Maptitude software we've been discussing --

A Yes.

Q -- is this the same in every state? Obviously, there's different data fed into it, but the program is the same in every state?

A Yes.

Q So the Maptitude program you use to redistrict, say, the state of Alabama is the same software used to redistrict the state of Virginia?

A Yes.

Q Same in North Carolina?

A Yes.

Q Same in Ohio?

A Yes.

MR. HAMILTON: Thank you. No further questions.

[967] JUDGE PAYNE: You're frowning and complaining, Mr. Braden. What's the problem here? Is that an objection or what? I haven't ever seen a frown objection.

MR. BRADEN: I don't think the Court is going to let me ask him any more questions. I think he may have misspoke.

JUDGE PAYNE: Well, let's get it straight so go ahead. That gives Mr. Hamilton a recross, but let's get it straight. Come up here where they can hear you and I can hear you and the court reporter can hear you.

RECROSS-EXAMINATION

BY MR. BRADEN:

Q Do you actually know whether all states use Maptitude? Aren't there a number of different softwares that some states use?

A He asked me if Maptitude was the same in every -- whether they were different versions of Maptitude in different states was my understanding. And --

Q I misunderstood. I thought -- thought you had answered a question saying that the state of Alabama used Maptitude, but you don't know whether they did or didn't?

A No. There are competing software vendors. I don't know.

JUDGE PAYNE: All right. You have the final shot.

[968] MR. HAMILTON: Thank you, Your Honor. And I have -- I'm not frowning, and I don't need to ask any more questions. Thank you.

JUDGE PAYNE: All right. Is that the -- you can step down. Thank you, Dr. Rodden, for being here. Are you all through now?

MS. KHANNA: We have one more witness, Your Honor.

JUDGE PAYNE: About how long? Probably not more than that. Make sure your chronometer keeps it in that zone. Will you, please?

MS. KHANNA: Plaintiffs recall Dr. Maxwell Palmer.

JUDGE PAYNE: And, Dr. Palmer, I remind you, you're under the same oath that you took earlier, you haven't not been excused.

MAXWELL PALMER,

called at the instance of the plaintiffs, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MS. KHANNA:

Q Good morning, Dr. Palmer.

A Good morning.

Q You submitted a reply report in this case; is that right?

[969] A Yes.

Q And I believe you've already identified that on the record as Plaintiffs' Exhibit 72?

A Yes.

Q We're not going to walk through all of the analyses in the reply report since it is already in the record, but I just wanted to touch upon a few key points. You read the rebuttal reports provided by Dr. Katz and Dr. Hood; is that right?

A Yes.

Q And you heard them testify in court?

A Yes.

Q Did you -- did anything that you read or heard from their testimony alter your conclusion regarding racial predominance in any way?

A No.

Q Why not?

A Dr. Hood did not evaluate or did not offer evidence on racial predominance. Dr. Katz only challenged one of my several analyses on racial predominance; that of the effect of race versus party on the assignment of VTDs to challenged districts. And, in fact, the evidence he presented in his report only confirmed my -- my conclusions.

Q And your conclusion in terms of the race versus party [970] analysis, what did it confirm that?

A That race predominated over party in the assignment of VTDs to the challenged districts.

Q What about your conclusions regarding racially polarized voting or the necessity of the 55 percent BVAP rule? Did anything that you heard from the testimony or read in the testimony of Dr. Katz or Dr. Hood change your conclusion in any way?

A No.

Q Why not?

MS. MCKNIGHT: And, Your Honor, here I'd object. Dr. Palmer's reply report, the section on racial polarization, relies on data from elections postdating 2011. In defendant-intervenors' direct case, we understood from the Court that we were not to go into elections postdating 2011.

So not only does this not rebut anything that was said yesterday, it also deals with information that you asked us to exclude from our presentation.

MS. KHANNA: Your Honor, I'm asking whether he has heard anything about racially polarized voting or the necessity of the 55 percent threshold rule, both on topics that are addressed -- were addressed during the reports and testimony, whether that changed any of his conclusions. It's just the substance of his rely report.

[971] JUDGE PAYNE: Well, the report does have a lot of post 2011 material in it, and to the extent you're asking about it, you can't ask about it.

And the problem is creating by asking this question, and that is, does it change your opinion, why not. That opens the door to a ramble, and it's not -- I think you just can tailor your own questions if you want them answered to get to that point.

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: But then we don't have a rambling answer that will implicate the 20 -- post 2011 data that they were precluded from using and that you can't use either.

MS. KHANNA: Thank you, Your Honor.

Q Dr. Hood provided some analyzes about reasons why a map drawer might want to raise the black voting age population in a given challenged district or majority minority district. Did any of his analyses change your conclusions regarding the necessity of a 55 percent BVAP floor in any of the challenged districts?

A No.

Q And why is that?

JUDGE PAYNE: That's the problem.

BY MS. KHANNA:

Q To what --

[972] JUDGE PAYNE: You have to ask the question on the topic that you want to ask where is here. His whole report and his whole opinion can be affected by things that we can't let in or we've kept for them and they have to come out for you. So maybe you can rephrase your question.

MS. KHANNA: And for the record, I'm asking solely Dr. Hood's suggestions as to what might motivate a map drawer to draw a -- to increase the BVAP in a given district.

JUDGE PAYNE: Do you know of anything that might motivate a map drawer? Let's start with that. And then if the answer is yes, okay. Then you'll follow up.

Q Let me rephrase it. Do you recall the portion of Dr. Hood's report specifying reasons why a map drawer might want to raise the BVAP in a given majority minority district?

A Yes.

Q Did you hear him testify about those reasons one by one yesterday?

A Yes.

Q Did any of those reasons change your decision -- or your conclusion about the necessity of the 55 percent BVAP rule?

A No. Dr. Hood raised several concerns --

[973] JUDGE PAYNE: That's enough at this stage. No. And then she can ask any follow-up questions that she'd like to ask.

Q Did you see any analyses provided by Dr. Hood to substantiate those concerns?

A There was one analysis of a primary election in a House of Delegates race from 2009 that Dr. Hood offered. However, I do not find his conclusions there meaningful because while Dr. Hood did an ecological inference analysis, he neglected to include confidence intervals or any measure of uncertainty on his own statistical analysis. And so we have no way of interpreting those results to know if they are statistically significant and if there are actual meaningful differences between racial voting patterns between whites and African-American voters.

Q Dr. Palmer, in Dr. Hood's report, he suggested that looking at primary elections may inform the racially polarized voting analysis in some way. Do you recall that?

A Yes.

Q And as we've already discussed, one of the primaries he looked at was a 2013 primary, and he also looked at 2009 primary that you just spoke about; is that right?

A Yes.

[974] Q Did you examine any primaries in response to Dr. Katz or Dr. Hood's reports?

A Yes. I also looked at the 2013 democratic primary for Attorney General as well as the 2008 democratic primary for president.

Q And I'm not going to ask any --

JUDGE PAYNE: That's the problem. You're going beyond the answer, Dr. Palmer. You just elicited on objection. Now, what is the objection?

MS. MCKNIGHT: Your Honor, we'd object to any testimony about any until analysis he did on data that was postdating 2011.

MS. KHANNA: And I will not ask any questions about it, Your Honor.

JUDGE PAYNE: Do you see why it's necessary to listen to the question. Just answer the question. Because once you go beyond, then we have all this to deal with. All right. So the objection is sustained. The answer is stricken. You may start again.

BY MS. KHANNA:

Q Dr. Palmer, did you review any primaries predating 2011 in response to Dr. Hood and Dr. Katz's analyses?

A Yes.

Q What primary did you examine?

A The 2008 primary for the -- the democratic primary [975] for president.

Q And why did you look at that primary?

A Dr. Katz suggests that looking at a primary where there's an African-American candidate running against a white candidate could be useful. Dr. Hood suggests this as well. The 2008 democratic primary was the most recent statewide primary with an African-American candidate running against a white candidate available at the time of the map drawing.

Q That primary would have been available -- the information would have been available to anyone drawing maps in 2011, correct?

A Yes.

Q Can you please turn to page 12 of your reply report? And that is Plaintiffs' Exhibit 72, page 12. And this is Figure 4. Does this figure reflect your racially polarized voting analysis of the 2008 democratic primary for president?

MS. KHANNA: Trish, can we make it a little bigger so we can see?

Q Does this figure reflect your racially polarized voting analysis of the 2008 democratic primary for president?

A Yes.

Q And is that basically all of the data points on the [976] left side of each cell?

A Yes.

Q What does this figure reflect about racially polarized voting in the 2008 democratic primary for president?

A This figure shows no evidence of racially polarized voting between African-American and white voters in the 2008 democratic primary for president in all 12 districts.

In 11 of the 12 districts, I actually find strong evidence that a majority of white voters were also voting for the African-American preferred candidate. Only District 77 do I find inconclusive evidence of polarization, and in no district do I find evidence that

white voters are polarized against the African-American preferred candidate.

Q What did you conclude from your analysis of this primary?

A There is broad support for African-American preferred candidates in this primary, and the African-American preferred candidate won this primary in all 12 districts by a large margin.

Q Thank you. Dr. Palmer, you were in the courtroom yesterday when both Dr. Katz and Dr. Hood were asked how long they had to prepare their analyses, correct?

A Yes.

[977] Q Do you recall how long you had to prepare your reply report in this case?

A Two weeks.

Q And how many new elections did you perform ecological inference analyses on in your reply report?

A Six.

Q How many districts were included in each of your racially polarized voting analyses?

A Twelve.

Q Can you tell me approximately how long it took to gather election data for any of these -- for all of these elections?

A Only a day or two.

MS. MCKNIGHT: Your Honor, I'd object here again. The data she's referring to is data postdating the 2011 election.

MS. KHANNA: Your Honor, yesterday testimony was admitted and it was not stricken or not deemed irrelevant about how long it took their experts to get the information they needed to provide their analyses.

JUDGE PAYNE: Do you want to ask him how long it took him to get his information up to 2011 elections and cut out the 2013?

MS. KHANNA: Your Honor, I believe the --

JUDGE PAYNE: I think that -- let's -- we need [978] to get going, and this is basically -- it is utterly irrelevant how long somebody took to give you their report if everybody is playing on the same field. The fact that they had little trouble with it or had to work hard is not something that generally is considered by finders of facts at all. Maybe juries do it, but we don't do it.

MS. KHANNA: Thank you, Your Honor.

JUDGE PAYNE: Let's go. That's not helpful to us.

Q Were you here during Dr. Katz's testimony yesterday when he spoke about some confusion between ACS data and census data?

A Yes.

Q Now, the decennial census, that's an actual count of people; is that right?

A That's right.

Q And that takes place how often?

A Every ten years.

Q What information is provided on the census form?

A For each individual, the census records age, gender, race and ethnicity.

Q That is the only data available on the census block level?

A Yes.

Q What is the American Community Survey to which [979] Dr. Katz referred, also known as the ACS, I believe?

A The ACS is a survey run by the Census Bureau that collects information on a large variety of demographic factors.

Q Like what?

A Education, income, employment. There's a very large number of variables.

Q And in what ways is the ACS, in terms of its -- sorry. It terms of how often ACS data is collected, how is that different than the census?

A The ACS is I believe run every year and then new information is released annually. But this is a survey. And so unlike the census, which is a count, is provided only estimates, not actual counts.

Q And is ACS data reported at the census block level?

A No.

Q So the only data that is available at the census block level is census data; is that correct?

A That's right.

MS. KHANNA: Thank you, Dr. Palmer. I have no further questions.

JUDGE PAYNE: Any cross-examination?

MS. MCKNIGHT: No, Your Honors. I have none.

JUDGE PAYNE: All right. Thank you, Dr. Palmer. You're excused.

[980] (Witness stood aside.)

JUDGE PAYNE: Is that the end of your case?

MR. HAMILTON: It is, Your Honor.

JUDGE PAYNE: All right. You all -- we asked you to do an argument. We'll take a 20-minute recess, come back and hear the arguments.

MR. HAMILTON: Thank you, Your Honor.

JUDGE PAYNE: Will that give you enough time to pull your things together?

MR. HAMILTON: It will, Your Honor. We anticipated this.

JUDGE PAYNE: Oh, you did?

MR. HAMILTON: You know, you have to be prepared.

JUDGE PAYNE: Oh, I thought we gave tells.

(Recess taken.)

JUDGE PAYNE: All right.

MR. HAMILTON: Thank you, Your Honor. On behalf of the plaintiffs and the lawyers and the staff in the courtroom on the plaintiffs' side, I want to thank you all for your time and patience and attentiveness during the course of the trial over the last few days. It's been an honor to appear before you, and I thank you for your courtesy and that opportunity.

The evidence presented during the course of this [981] trial makes clear that during the course of the 2011 redistricting, the 11 remaining House of

Delegates districts, the Virginia General Assembly used race as the predominant factor, had no compelling State interest for doing so and in all events, failed to narrowly tailor those districts to that State interest.

Let's start with predominance. So much as changed since the last time I stood before this Court. For starters, the Supreme Court has now clarified the governing legal standard and provided expressed, clear direction for this Court. To be clear, and contrary to Mr. Braden's opening statement, the Supreme Court actually agreed with plaintiffs' understanding of the governing legal standard. Specifically, the Court affirmed that race predominates when, quote, race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

The Court rejected intervenors' interpretation of the predominance standard. As the Court explained, that approach foreclosed a holistic analysis of each district and led the District Court to give insufficient weight to the 55 percent BVAP target and other relevant evidence that race predominated. The Court emphasized the necessity of examining the design of the district as a [982] whole and said, quote, Concentrating on particular portions in isolation may obscure the significance of relevant district-wide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district or the use of an expressed racial target. A holistic analysis is necessary to give that kind of evidence its proper weight, closed quote.

The relevant district-wide evidence called for by the Court literally abounds in the record before this Court. Two factors: Stark splits in the racial composition of populations moved into and out of disparate parts of the district, and the expressed use of racial targets. So let's start with the second one first, the use of an expressed racial target.

And we don't really have to spend a whole lot of time on this. It's undisputed and, in any event, law of the case; a 55 percent black voting age population expressed racial target was developed based largely on concerns relating to House District 75 and then, in the words of the Supreme Court, quote, applied across the board to all 12 districts, closed quote, and despite -- and that despite profound differences between the 12 districts, some urban, some suburban and some rural.

Now, intervenors would like you to think that the [983] mere existence of this 55 percent rule is plaintiffs' entire case start to finish. Mr. Braden said as much in his opening statement. But, of course, in truth, plaintiff has always argued to this Court and to the Supreme Court that Delegate Jones employed a rigid mechanical quota and that that rigid mechanical quota had a direct and significant impact on the actual boundaries of the challenged districts.

The evidence you've heard over the last few days vindicates plaintiffs' position. Delegate Jones admitted not only that he considered race, which, of course, he had to, but that it dramatically affected the construction of those districts. In District 71, for example, he testified that he could not move the district to the west because it would, his word, dilute the black voting age population too much.

He admitted that he added black VTDs and dropped predominately white VTDs all in the service of the 55 percent rule. And that rule trumped all other criteria. He admitted both in principle that the 55 percent black voting age population rule predominated over other redistricting criteria and in practice. And, of course, he had to, again, because the evidence abounds. The plan split counties, cities, assigned whole VTDs on the basis of race and, perhaps most dramatically, split VTDs [984] throughout the 11 districts. Counties were split, and not only split, but split expressly on racial lines. The Court has already found an invalidly racial split of Dinwiddie County, which, by the way, defined the boundary for 63. So if it was invalidly racial for District 75, then the same is necessarily true for District 63. I think that's referred to in the law as the sauce for the goose is sauce for the gander problem.

The line splitting Chesterfield, too, divides the predominately black portion from the predominately white portion. Henrico is splintered across -- in several ways, with Delegate Jones admitting that he pushed District 71 into a sliver of Henrico by moving the Ratcliff VTD to enhance the black voting age population of the district.

Cities, too, were split. And not just split, but divided along racial lines. Hopewell, in District 63, is perhaps the clearest example, but Richmond, too, demonstrates a disregard for city boundaries. Splintering The Fan district to move a heavily white democratic VTD to a republican district, that was obviously for racial reasons, as Delegate Jones all but admitted.

Whole VTDs were moved in and out of the districts to balance racial populations. VTD 701, 702 and part of 703 -- this is all a heavily African-American area -- were moved into District 71 for racial reasons. VTD Suburban [985] Park, a largely white area, was moved out of District 89 to adjust its racial composition. And districts lines were selected, either retained from the benchmark or crafted wholly out of thin air, that carefully demarcated the boundaries between heavily African-American areas and heavily white areas.

And, of course, most dramatically, VTDs were split. And not just in some random way to equalize population, but carefully to divide predominately African-American populations from predominately white populations. The evidence on this point literally jumps off the page from Dr. Rodden's dot density maps. It's vivid, compelling and, in the words of the Supreme Court, stark. And it's exactly the same evidence that the Court considered particularly compelling in the Bush v. Vera and Alabama decisions by the U.S. Supreme Court.

Now, the intervenors protested -- again, in the words of Mr. Braden -- that these VTD splits were, quote, virtually -- not totally, but virtually, without exception, every split VTD is done to equalize population pursuant to the criteria, closed quote. That's from Mr. Braden's opening statement. This is simply beyond belief and inconsistent with the record before the Court.

There are innumerable ways to split a VTD to balance population, but somehow, almost every time it had to be [986] done, it was done along stark racial

lines. How is that possible? How is that credible? We can look at several examples. Hopewell, Ward 7, we saw that split. Granby in District 89. For the record, Hopewell is in District 63. Granby, in District 89, was split along racial lines. Reon, in District 90, was split along racial lines. Lakeside, District 77, split along racial lines. And perhaps most dramatically, the Reservoir, Epes, Denbigh, Jenkins four-way split right along racial lines.

Dr. Palmer testified that 23 -- in 23 out of 24 cases of split VTDs, a full 96 percent of the split VTDs split between challenged and nonchallenged districts followed the same pattern we've seen here. They were split along racial lines such that the higher black voting age population is in the challenged district and the lower black voting age population is in the nonchallenged district.

There was just a single instance where that didn't happen. If these VTDs were split solely to equalize population, one would expect to see the splits divide racial populations one way sometimes, racial populations the other way sometimes. You wouldn't see a consistent pattern like this 96 percent of the time.

Now, intervenors have pointed to other nonracial goals that Delegate Jones was pursuing. But even if [987] factors other than race played some role, that's just irrelevant to the analysis. Race can predominate. Race does predominate even when the legislature pursues other nonracial goals in addition to its racial goals. That's, of course, obvious. No districting plan is done solely for one reason or another. And that's exactly what happened here. Every rule, every

principle, every criterion was, at some point, compromised with one exception: The black voting age population 55 percent expressed racial target.

So the evidence that the Supreme Court called for in its decision in this case is overwhelming. There's an expressed use of a racial target -- that we can just take off the table since it's the law of the case -- and stark splits in the racial composition of populations moved into and out of disparate parts of the district. Using evidence that the Supreme Court itself has held in not one but two different cases is particularly relevant. That establishes predominance.

Let me turn to narrow tailoring just for a moment. It's equally clear that the General Assembly's use of race was not narrowly tailored to achieve a compelling government interest. For starters, intervenors offered no evidence that their use of a racial target served any compelling government interest. It's undisputed, and the [988] law of the case, that the 55 percent racial target was created to address District 75 and then applied across the board to all the challenged districts. Delegate Jones admitted that his functional analysis was limited to District 75. And as for the remaining districts, he didn't look at voter turnout. He didn't look at racial voting patterns. He didn't look at registration rates. And with very few insignificant exceptions, he didn't look at election results. That's not a strong basis in evidence.

At the first trial, Delegate Jones tried to pin the 55 percent rule on other delegates who, according to Delegate Jones, advocated for that number. As you've heard during the course of this trial, Senator McClellan and Delegates Howell, James and McQuinn

all denied that they advocated for the use of a 55 percent black voting age population racial target. And Senator Dance testified that the number was the gospel according to Delegate Jones. I think she said that three times until the Court -- and the Court even made a joke about it.

Delegate Jones insisted that he derived that number from members of the Black Caucus, but it's telling that intervenors have been unable to produce a single member of the Black Caucus to corroborate Delegate Jones' statement. At the same time, plaintiffs have offered testimony from [989] several African-American delegates and former delegates, all of whom dispute Delegate Jones' account.

Before this second trial, this Court asked the parties to summarize new evidence addressing factors other than race that were submitted in the formation of the districts. In the opening statement, intervenors were unable to identify any such evidence, and not surprisingly, during the course of this trial, they have been unable to present any such evidence.

This is, at end of the day, a simple case. Delegate Jones applied an expressed racial target of 55 percent black voting age population to 11 very different districts. That's not disputed. Pervasive racial sorting was required to comply with the 55 percent rule. But Delegate Jones had no reason to believe that racial sorting was required to avoid retrogression, let alone a strong basis in evidence. In fact, he admits that he didn't even try and assess the necessary level of black voting age population in any district except for District 75. That's also undisputed. This mechanical and unjustified sorting of voters, according to the color of

their skin, offends the commands of the 14th Amendment.

With respect, plaintiffs urge this Court to invalidate the 11 remaining challenged districts and implement appropriate, immediate and effective remedies [990] for the constitutional violation. Thank you, Your Honors.

MR. BRADEN: As I said at my opening, the question before this Court, the first question -- I believe, really, in the end, the only question before this Court -- is whether race was the predominate -- the predominate factor in drawing the challenged districts. The predominate factor in drawing these challenged districts is the 1991 districts and the 2001 districts. These are predominately the same districts that have been in place since 1991. And this was clearly expressed by Jones. And record is replete with evidence of that.

So the burden is on the plaintiffs to prove to this Court that race predominated. I believe this Court has already found that the plan does not, in fact, violate traditional redistricting criteria. And I believe the evidence already shows that, but let's hear what the experts of the other side have provided to this Court that show that race is predominate. And they've provided you a VTD analysis. That forms basically their only argument on predominance.

I would suggest to you that that's the -- VTD tail -- split VTDs are the tail on the redistricting dog. The reality is that's a small part of the redistricting process. Even if you were to accept that these VTDs were drawn upon race, which the evidence absolutely, I [991] believe -- direct evidence shows is not true, the

numbers involved are simply too small. We're going to decide that race is predominant because of, by definition, a split of a VTD that would be less than 800 people. That's 1 percent. That's the range we're talking about here. So we're talking about numbers. This VTD analysis involves tiny, tiny numbers. Not enough to be the basis of a predominance finding.

What a shock we would find that when you divide a vote tabulation district, a precinct between two districts, one of which is predominately African-American and one of which is white, that the VTD that goes into the black district is predominately black because it needs to be contiguous. So what a surprise giving patterns of residency that if you're picking a VTD between two districts and you split it, the side that's closer to the black district, in the black neighborhood -- let's use like the reality here of what we're talking about, neighborhoods. That neighborhood is likely to have more black residents than the other side, which goes into what could be a majority white district. That's what we're discovering with any of these numbers, assuming that any of them were a large enough number to be meaningful. And they're not. They're just not.

You've seen direct testimony, first of all, that [992] Jones wasn't involved in splitting these VTDs, period. He's the architect of the plan. This -- this VTD analysis is based upon numbers that weren't important enough for him to be involved in or even to consider except in the isolated instance of doing something in the city of Richmond at the request of the Richmond government. So how can something not important enough for the architect of the plan to be involved with or pay any

attention be the basis for this Court to determine that race was predominant?

Then you have the testimony -- I know it was long. I know it was extensive, but you had the testimony from the person who did this directly, expressly saying it wasn't based upon race. Couldn't have been clearer. There wasn't any equivocation whatsoever. Was some of it involved in politics? Absolutely. No one has ever denied that. District 95, up at the end of it, as this Court found last time, what's happening in splitting those precincts? It's an expressed desire to create a more attractive swing district on the peninsula and to preserve a republican incumbent.

So are all the democrats -- is there an attempt to put the democrats and split the precinct to put the democrats in challenged District 95? Absolutely. So if this was a political gerrymandering claim, I might make a [993] different argument. That's not before this Court. What's before this Court is a racial gerrymandering claim. There's no testimony of people actually involved in the process showing that any of these splits are based upon race. The people who did them said no. They're too small to be meaningful.

My -- Kevin Hamilton stands up and says significant number of voters is what the Supreme Court is looking for being moved in and out. The VTD analysis doesn't provide a significant number of voters being moved in and out even if you accepted it on race. That's his language.

You need, as the Supreme Court said, to look at the design as a whole. Are they looking at the design as a whole? No. Their expert witnesses' analysis, when you look about their VTD analysis weighting back and

forth as to what's the best predictor of a VTD being in or out, and they say race is more important than politics. And that's what their statistical analysis says.

And I won't -- you know, that's interesting. But, of course, the statistical analysis that everyone agrees is, in fact, the strongest statistical analysis is was it in the benchmark district? If it was in the benchmark district, the statistics show clearly that, by far, is the best predictor of whether it will be in the new plan. Not race, not politics, was it there before. Totally [94] consistent with -- totally consistent with the statements of Jones and Morgan.

I don't believe this Court has received any evidence on which it could determine that race was predominant. Certainly not from the experts. You did, in fact, receive some testimony from some members. I urge the Court first to remember my admonition about drawing a district is easy, drawing a plan is hard. Most of the testimony I heard from the black members were, I wasn't happy with my district. I didn't hear them -- with the exception of McClellan and Dance -- talking about race. I heard them say, Oh, my district wasn't the way I wanted it to be. What a surprise. With the exception maybe of Jones, nobody got exactly the district they wanted.

So what I would suggest to you is let's not listen to the testimony here that appeared within the last few days. Let's go back and listen to -- and I suggest listen. Listen. We've got the videotapes of the floor speeches of these individuals. First of all, they all voted for it. But leaving that aside, go back and listen to the floor speeches. We didn't bring many of them up

here of the members of the Black Caucus. And the support for this bill on the floor from the Black Caucus was unanimous except for one member who was unhappy that it wasn't more than 55 percent.

[995] We don't need post hoc testimony. We need realtime, what was your position then. And there's lots of videotape of members talking about 55 percent being the appropriate number. That was at that time. Maybe people's memories have changed as to where 55 percent came from, but the reality, at the time it came from the Black Caucus.

In my opinion, there's no data supporting a notion that a significant number of black voters were moved in and out of any district with the exception possibly of 71. The numbers moved in and out move at a random pattern. Half the districts went up in black voting age population. Half the districts went down. If you look at Rodden's report, he argues that it shows racial sorting in some districts because blacks were put in and in some districts because blacks were taken out. These are all challenged districts. And in some districts because they were kept the same. It's, you know, damned if you do, damned if you don't, damned if you don't do anything is what Rodden's report talks about.

The reality, there is not -- look at the numbers. Not percentages, not little dots moving back and forth, but the actual numbers. The numbers are relatively modest in all the districts, really, with the exception of one, and that's 71, Richmond. The benchmark plan was [996] 46 percent, approximately. The incumbent member, who's now a senator, was a particularly popular candidate.

I thought at the last trial that the plaintiffs had taken the position that all the districts needed to be above 50 percent. I believe that's what they argued to this Court in that trial. The benchmark plan was 46. I heard arguments here and briefs arguing, And we don't need more than that because Senator McClellan is such a popular -- you know, Senator McClellan could win so that's proof that the minority candidate -- the candidate of choice in the minority community -- can win.

And the answer is the Voting Rights Act and preclearance isn't about one candidate. It's a question of whether the minority community, through the next decade, will be able to elect its candidate of choice.

Again, it's important to understand what the obligation of the State is in this circumstance. The State has this kind of bizarre situation when it goes to the Department of Justice to get preclearance. To get preclearance, they have to prove that the plan would not regress in the ability of the minority community to elect its preferred candidate of choice. That's an affirmative duty.

So if you listen to their expert, his criticism of 71 was it didn't move west, didn't take up The Fan area and [997] the museum area. Of course, if the district had moved that direction, it would have been dropped to probably around 40 or 41 percent African-American black population. All those numbers are already in the record as to what happens if you pick up his precincts.

They ask us to discount the fact that there's a delegate who has a family business -- actually, two family businesses and grew up in 207. Somehow or another you're supposed to ignore that and think that

the only thing that matters is that they weren't good republican districts. That strikes me as incredible.

But let's not look at whether their expert whose experience in The Fan is walking through it as a tourist is better than Jones or Delegate Loupassi. Let's look at the notion of what would happen if we did what they suggest. You get a 40 percent -- 41 percent black voting age population in District 71. We would then have to go to the Department of Justice and ask them to preclear that. There will have been substantial -- what does the Department of Justice do in preclearance? Among other things, they call up the black members of the legislature and black community leaders.

Does anybody in this court believe we could have gotten this plan precleared at 40 or 41 percent black voting age population if the Black Caucus was saying we [998] needed 55? That's nonsense. Absolute nonsense.

We've got to have a chance to draw a plan. The State should not be put in a straightjacket by the Courts. Give them a chance to draw a plan. He had a goal of 55 percent. He didn't believe he actually reached it. We're not going to relitigate which black voting age numbers are the correct ones, but this was a legitimate effort to comply and get a plan. The compelling State interest is to get preclearance at the Department of Justice. It doesn't have to do anything, in the end, with anything other than that requirement.

I don't know how you would advise a legislative body if this plan doesn't work. Was it partisan to some degree? Of course. But this is a plan that got a

majority of the republicans. Not a surprise, they got all the republicans. But they got a significant majority of the democratic votes, and they got all but one vote from the Black Caucus.

If this process doesn't work, then what process will? What number do we have to use? What's the magic number we need? Their argument, effectively, is I've got to hire somebody from Harvard or Stanford to come in and come up with some magic number, which, of course, if I hired a political scientist from somewhere else would have given me another number as to what the number should be. That's [999] crazy.

Let the legislature have, as the Supreme Court has said, the right to do its duty, to be involved in politics and make decisions, but you've got to give them flexibility. You can't put them in a straightjacket. This was a good-faith effort to adopt a plan. I don't think anybody has any doubts about that. And simply, this was a status quo effort. What was the predominant factor involved here? After you get -- we all know what the predominant factor was; get it passed and be legal and have it not lose in court.

But if you're wanting to know the overall goal, it's really pretty clear. It's status quo. That's the predominant factor. Not race. Was race considered? Yes. Was there a goal? Yes. But that wasn't enough at the Supreme Court to make this plan subject, or any of the districts in it, subject to strict scrutiny. Thank you, Your Honors.

JUDGE PAYNE: Thank you.

On behalf of the Court, I think I'd like to express appreciation to all counsel for a fine job litigating the case, litigating zealously and behaving professionally

in all respects and presenting good cases for both sides.

I think that it would be remiss not to express appreciation to Ms. Marino, Ms. Tolbert and Greer Smith [1000] for the fine work that they did to get the evidence put together, given to us in a useful fashion when and as we asked for it. And we weren't always easy and consistent in our requests, but we appreciate it very much. And I think the last time I said that the firms ought to give all of you a raise, and I think you've earned it. And we thank you very much, the legal assistants, for their fine work in enabling us to go forward.

We need to set a briefing schedule. You've got a transcript on a daily basis, do you?

MR. HAMILTON: We do, Your Honor.

JUDGE PAYNE: So sometime next week you'll have the -- you'll have the complete transcript.

MR. HAMILTON: I think sometime tomorrow we'll have the complete transcript.

JUDGE PAYNE: Tomorrow. Okay.

MR. HAMILTON: We've been getting them every night at about midnight.

JUDGE PAYNE: So when -- you have the first go. You have the burden of proof. When do you want to file yours?

MR. HAMILTON: Well, we -- first of all, two questions. One, the last time I think we did this, we did simultaneous opening briefs and simultaneous reply briefs. And I would submit that that might be appropriate here.

[1001] JUDGE PAYNE: I think it led to some confusion last time, some difficulty in figuring out where things were and left the Court in sort of an unusual position. Do you agree with that?

JUDGE KEENAN: That's fine. I want to mention one thing, if I could, after you're done.

JUDGE PAYNE: Yeah. Sure. Sure. On the briefing?

JUDGE KEENAN: Yeah. About the content of the briefing.

JUDGE PAYNE: Oh, yeah. So I think open, response, reply.

MR. HAMILTON: Two weeks from Monday, perhaps, would be appropriate time for an opening brief. And I'd suggest two weeks after that for the -- for the opposition and then maybe two weeks after that for the reply.

JUDGE PAYNE: That Monday is the 16th. So the 30th you would do your opening brief? Did you ask the people who have to do this?

MR. HAMILTON: I'm sorry?

JUDGE PAYNE: Did you ask the people who have to do this?

MR. HAMILTON: I actually did, and I have the note to prove it.

[1002] JUDGE PAYNE: Two weeks from Monday is the 30th. Is that what you meant?

MR. HAMILTON: Yes, Your Honor.

JUDGE PAYNE: All right. And then two weeks from that is November 13th. Is that what you meant?

Is that what you all meant was two weeks or is that what you want is two weeks and is the date correct?

MS. MCKNIGHT: Yes, Your Honor. That's fine. So we understand plaintiffs will file an opening brief on October 30th. Defendant-intervenors and defendants, if they'd like, will file reply briefs on November 13th.

JUDGE PAYNE: And then response -- response briefs. And then they get a right of reply. And, Mr. Hamilton, when did you want to file that?

MR. HAMILTON: Maybe Wednesday, November 22nd would be good. That's a little less than two weeks after the opposition brief, but is --

JUDGE PAYNE: Thanksgiving is the 23rd. Does that make a difference to your schedule?

MR. HAMILTON: To my schedule?

JUDGE PAYNE: Or who -- to those who are going to carrying the laboring oar.

MR. HAMILTON: I'm kidding, Your Honor. No. Wednesday the 22nd, I think, is --

JUDGE PAYNE: November 22nd.

[1003] MR. HAMILTON: And if we might, given the number of different districts involved, I would ask leave to file overlength briefs, maybe 40-page opening briefs and 25-page reply.

JUDGE PAYNE: Is that -- given the need to do as the Supreme Court said, which is to consider it district by district and the difficulty in doing that, I don't have any problem with a brief of that length. Do you? Anybody?

JUDGE KEENAN: That's fine.

JUDGE PAYNE: Does that suit you, 40 for their opening, 40 for your response, 25 for their reply?

MS. MCKNIGHT: Yes, Your Honor. That's fine.

JUDGE PAYNE: All right. And I think Judge Keenan has something she'd like to say about the content of briefs.

JUDGE KEENAN: Yes. I'd like to ask the parties to address the alternative prospect. This is not intended to signal anything at all. But I just want to make sure all the bases are covered; that if, for some reason, the Court finds the plaintiff has met its proof burden as to some but not all districts, what is the consequence for the remedy? Is this regional in nature as well? For example, if a burden of proof is found to have been met in Richmond but not on the peninsula or in South Hampton [1004] Roads, what does that do? If you'd consider the universe of alternative possibilities rather than the primary position that you're arguing, and include both of those for our frame of reference, I think it would be helpful.

MR. HAMILTON: Yes, Your Honor.

JUDGE PAYNE: Do you have anything you'd like to add to that?

JUDGE ALLEN: No.

MS. MCKNIGHT: Pardon me, Your Honor. Just -

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JUDGE PAYNE: Yes, ma'am.

MR. RAILE: I -- just to be clear, Your Honor, are you talking about the remedy if it's actually struck down?

JUDGE KEENAN: Where is the Court left to go?

MR. RAILE: Because the burden sort of flips. But you mean the ultimate they win on a district?

JUDGE KEENAN: No. What I'm saying is take -- we'll call the district by a number that is not in this case. Let's say they win on District 10. What happens to the other districts?

JUDGE PAYNE: If the only thing they win on is District 10, what happens to the other?

JUDGE KEENAN: Right.

MR. RAILE: I understand. Thank you.

JUDGE PAYNE: If they win on more than those [1005] two, what do they --

MS. MCKNIGHT: Thank you.

JUDGE PAYNE: I think -- is that right?

JUDGE KEENAN: Yes.

JUDGE PAYNE: Okay. All right. Again, thank you very much. The case is submitted, and we'll proceed. We'll let you know, after the briefing, whether we require oral argument on the briefs. We'll be in adjournment.

(The trial concluded at 11:52 a.m.)

Trial Brief of Defendants (June 16, 2015)
(ECF 73)

INTRODUCTION

This matter involves the constitutionally of twelve Virginia House of Delegate districts drawn and enacted by the Virginia General Assembly in 2011. The Virginia State Board of Elections ("SBE"), and their members, and the Virginia Department of Elections ("ELECT"), and its Commissioner (collectively "the Defendants"), implement and oversee elections in the Commonwealth and set administrative policies related to those elections. As administrative agencies, they had no substantive role in the drawing or enactment of the Virginia House of Delegates' 2011 redistricting legislation.

The Virginia General Assembly, which consists of the House of Delegates and Senate, are responsible for drawing and enacting redistricting legislation. Once HB 5005, the bill setting forth the 2011 redistricting plan, was passed by the General Assembly and signed into law by the Governor, Defendants were legally bound to implement the new districts and administer elections consistent with the law.

Upon the filing of the complaint in this matter, the Defendants were the sole defendants and began to mount a defense. However, the House of Delegates and its speaker William J. Howell ("Defendant-Interveners")–the parties that actually drew the House districts enacted by HB 5005–quickly intervened in the matter and are defending the plan they created and enacted. To avoid duplicating efforts, conserve state and judicial resources in the defense of this action, and avoid potentially contradictory

defenses that could undermine one another, Defendants, representing the SBE and ELECT in their official capacity and thus the Commonwealth, will allow Defendant-Interveners' to lead the defense of this matter. Accordingly, Defendants have withdrawn their designated expert witness and do not intend to present witnesses or exhibits at trial beyond that which will be presented by Defendant-Interveners.

FACTUAL BACKGROUND

Defendants SBE and ELECT are administrative agencies created for the sole purpose of implementing and overseeing elections in the Commonwealth and setting administrative policies related to those elections:

> The State Board, through the Department of Elections, shall supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws . . . .

Va. Code Ann. § 24.2-103; *see also* § 24.2-404 *et seq.* (ELECT shall provide for operation and maintenance of voter registration system). The SBE and ELECT have no substantive role in drawing or enacting of the Commonwealth's redistricting legislation.

The Virginia Constitution requires that the General Assembly reapportion and redistrict electoral

districts in 2011 and each tenth year thereafter. Va. Const. Art. II, § 6. Each district "shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." *Id.* To comply with Article II, § 6 of the Constitution, the General Assembly was required to enact new electoral House of Delegates districts in 2011.

I. The Redistricting Process

The General Assembly began preparing for the decennial legislative redistricting by reviewing census geography, incorporating Virginia's voting precincts in the census geography, reviewing census redistricting data at the voting precinct level, building a geographic information system, and acquiring software to enhance the system used in 2001. Department of Justice Submission Attachment 17–Legislative History of 2011 Virginia General Assembly Redistricting Plans (hereinafter "Attachment 17").[1] In 2010, the House of Delegates Committee on Privileges and Elections scheduled a series of six different public hearings throughout Virginia encouraging public

[1] In this brief, Defendants reference exhibits that both Defendant-Interveners and Plaintiffs will be presenting and relying on at trial, namely, the § 5 preclearance submission to the Department of Justice with regard to the 2011 Plan and legislative testimony by Delegates Jones, Armonstrong, Morrissey, and Tyler at the April 5, 2011 Special Session. Because exhibit lists are due the same day as trial briefs, Defendants have not referenced the exact exhibit number in the citations set forth herein. After the exhibits are filed and if the Court requests, Defendants will supplement this Trial Brief with updated record citations.

input on the redistricting process. *Id.* This was the first time the Commonwealth had ever actively sought out public comment in the redistricting process.

On February 3, 2011, Virginia received redistricting data from the U.S. Census Bureau in the form of Public Law 94-171. *Id.* From February 27 to April 4, 2011, the General Assembly convened for a redistricting special session. *Id.* In March and April 2011, eight public hearings were held throughout the Commonwealth. *Id.* Throughout the redistricting process, members of the public testified to all aspects of the process of redistricting and the effect it may have on communities of interest throughout the Commonwealth, the protection of the equal population principle, and the avoidance of retrogressing majority-minority districts. H.D. 2011 Spec. Sess. I, at 38 (Va. April 5, 2011) (statement of Del. Jones). This testimony and information was received both through comments made at the public hearings as well as written and oral submissions made to the Committee on Privileges and Elections and individual representatives.

On March 25, 2011, the House Committee on Privileges and Election adopted a resolution setting out the criteria that the committee would follow in reviewing redistricting plans for the House of Delegates. Department of Justice Submission Attachment 4–Committee Resolution No. 1 (hereinafter "Attachment 4"). The guidelines included compliance with population equality principles based on the 2010 census data, federal and state constitutional requirements, the Voting Rights Act of 1965, 52 U.S.C. §§ 10101 *et seq.* ("VRA"), and

traditional redistricting factors such as contiguity, compactness, and communities of interest. *Id.* The guidelines further expressly stated that the foregoing criteria "shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria." *Id.*

On April 18, 2011, Delegate Jones introduced House Bill 5005, the bill setting forth Virginia's 100 House of Delegates districts (the "2011 Plan"). Attachment 17. On April 25, 2011, the House voted to engross HB 5005 and on April 27, 2011, the House passed HB 5005 by a vote of 80-9. *Id.*

The official 2010 U.S. census data showed that from 2000 to 2010, Virginia's overall population growth rate was 13%. Department of Justice Submission Attachment 5–Statement of Minority Impact (hereinafter "Attachment 5"). The data also showed that Virginia's African-American population grew at a rate of 11.6%, increasing from 1,390,293 in 2000 to 1,551,399 in 2010. *Id.* In the case of the 12 districts that contained majority African-American population after the 2001 redistricting process, the 2010 data showed that most of the 12 districts experienced growth rates well below the state average and, in a few cases, actually lost population over the decade. *Id.* In fact one of the districts had such a dramatic change in demographics that in 2011, prior to the passage of HB 5005, African-Americans no longer constituted a majority of the voters in that district. *Id.*, at Table 5.1. Despite demographic

changes resulting in the loss of population in these districts, the 2011 Plan contained twelve majority African-American districts (the "Challenged Districts"),[2] the same number as the Commonwealth's prior plan. *See id.* Eleven of the 12 African-American majority districts in the prior plan were below the ideal population by a total of 79,310 and only one of these districts was above the ideal population by 143. Attachment 17. The 12 Challenged Districts had a black voting age population ("BVAP"), ranging from 55.2% to 60.7%. *Id.* All delegates from the Challenged Districts voted for final passage of HB 5005 with the exception of Delegates Morrissey (74th), Tyler (75th) and Ward (92nd).[3] *Id.*

HB 5005 was signed into law by Virginia Governor Robert F. McDonnell on April 29, 2011, codified at Va. Code Ann. § 24.2-304.03, and submitted to the Attorney General of the United States for preclearance as required by Section 5 of the VRA. On June 17, 2011, the 2011 Plan received preclearance from the U.S. Attorney General. On November 8, 2011, Virginia held its first series of elections under the 2011 Plan.

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[2] The 12 Challenged Districts are districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95.

[3] Delegate Morrissey voted against the 2011 Plan not because of concern about his District but rather because of his distaste that the overall plan was designed by the Republican controlled House to eliminate seats of white Democratic Leaders of the House, including then Minority Leader, Delegate Ward Armstrong. H.D. 2011 Spec. Sess. I, at 19-21 (Va. April 5, 2011) (statement of Del. Morrissey).

II. Procedural History

On December 22, 2014, Plaintiffs, individual voters residing in the Challenged Districts, filed a complaint against Defendants seeking declaratory and injunctive relief prohibiting Defendants from implementing or conducting further elections on the Challenged Districts of the 2011 Plan.[4] *See* Dckt. No. 1. Plaintiffs filed an amended complaint on June 16, 2015. *See* Dckt. No. 71. Plaintiffs allege that African-Americans were unconstitutionally packed into the Challenged Districts through the General Assembly's adoption of a "55% African-American voting age population floor for each of the twelve Challenged Districts." Am. Compl. ¶¶ 35, 40. Plaintiffs allege a single cause of action–Violation of the Equal Protection Clause of the United States Constitution–resulting in "racial gerrymandering" and illegal vote dilution in the form of packing. *Id.* ¶¶ 1, 2.

Defendants, SBE and ELECT, however, do not have the power to redistrict or reapportion and thus are not the real party in interest. Nevertheless, Defendants filed an Answer with the intent of defending the duly enacted 2011 Plan. On January 23, 2015, the Virginia House of Delegates and Virginia House of Delegates Speaker William Howell, the parties that actually drew and enacted the 2011 Plan, filed a motion seeking leave to intervene in this case. Dckt No. 12. The Court granted the Motion to Intervene on February 3, 2015. Dckt No. 26. As discovery progressed, it became clear that Defendant-

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[4] The general election for the House of Delegates will take place on November 3, 2015.

Interveners would zealously defend the 2011 Plan that they created and enacted. To avoid duplicating efforts, conserve resources, and prevent contradictory defenses, Defendants will allow Defendant-Intervener's to present the primary defense of this matter. Nevertheless, the following is the Defendants' position on the status of the law on redistricting as it stands today.

LEGAL OVERVIEW

The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. "The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power." *Bush v. Vera*, 517 U.S. 952, 991-92 (1996). The Supremacy Clause thus requires a State's redistricting legislation to comply with the Fourteenth Amendment and the Voting Rights Act. *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, at *80 (E.D. Va. June 5, 2015) (Payne, J., dissenting).

I. Equal Protection Clause Of The Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution guarantees citizens the right to vote free of discrimination on the basis of race. *Shelby County v. Holder*, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting). The Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis, reflecting "the fundamental principle of representative government in this country [which] is one of equal representation for equal numbers of people, without regard to race, sex, economic status,

or place of residence within a State." *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). It further protects against (1) claims of racial gerrymandering where "the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification", *Shaw v. Reno*, 509 U.S. 630, 649 (1993) ("*Shaw I*"), and (2) claims of vote dilution having a discriminatory effect and discriminatory purpose chargeable to the state, *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981) (citing *Mobile v. Bolden*, 446 U.S. 55, 66-70 (1980)).[5]

II. The Voting Rights Act

In 1964, Congress exercised its power to enforce the Fourteenth and Fifteenth Amendment through its enactment of the VRA. *Shelby*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting). The VRA was enacted "to banish the blight of racial discrimination in voting . . . ." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA creates a private cause of action allowing plaintiffs to file suit if they are an "aggrieved person." 52 U.S.C. § 10302.

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[5] A claim of vote dilution is recognized under the Equal Protection Clause as well as § 2 of the VRA. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Vote dilution of a racial minority group's voting strength may be caused by (1) the dispersal of African-American voters into districts in which they constitute an ineffective minority of voters or from (2) the packing or concentration of African-American voters into districts where they constitute an excessive majority. *Thornburg*, 478 U.S. at 46 n.11.

A. Section 2

Section 2 of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . ." 52 U.S.C. § 10301(a). A § 2 violation occurs when based on the totality of circumstances, the political process results in minority "members hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg*, 478 U.S. at 47. Although there may be some overlap, a vote dilution claim under § 2 involves a separate inquiry from a § 5 violation. *Holder v. Hall*, 512 U.S. 874, 884 (1994). Thus, Plaintiffs cannot establish a § 2 violation merely by showing that the redistricting involved a retrogressive effect on the minority group. *Id.*

B. Section 5

Section 5 of the VRA required States to submit any changes to its voting standards, practices, or procedures for federal preclearance. 52 U.S.C. § 10304. Section 4 of the VRA sets forth the coverage formula to determine which states must comply with § 5. 52 U.S.C. § 10303. Section 5 applied to States where Congress found "evidence of actual voting discrimination," in the form of "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the

national average." *Katzenbach*, 383 U.S. at 330. From 1965 until 2013, Virginia was a covered jurisdiction under § 4(b) of the VRA.

Section 5 prohibits any covered jurisdiction from enacting any changes to its voting laws that will have "the purpose of or will have the effect of diminishing the ability of" any minorities to elect their "preferred candidates of choice." 52 U.S.C. § 10304(b), (d). Section 5 has a limited substantive goal: "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller v. Johnson*, 515 U.S. 900, 926 (1995). The determination whether a voting procedure or law is retrogressive requires a comparison of a jurisdiction's new voting plan with its existing plan. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997).

In *Shelby*, the Supreme Court declared that the coverage formula under § 4(b) was unconstitutional and that the coverage formula "can no longer be used as a basis for subjecting jurisdictions to preclearance." 133 S. Ct. at 2631. This holding specifically stated that it left unaffected the state's continual requirements to comply with § 2 and § 5's non-retrogression principle:

> Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on § 5 itself, only on the coverage formula.

Id. Accordingly, the legislature's obligation to comply with § 2 and to avoid retrogression in the ability of minority voters to elect their candidate of choice continues to this day. *See League of Women Voters of*

N.C. v. North Carolina, 769 F.3d 224, 241 (4th Cir. 2014) (post-*Shelby*, rejecting district court's finding that "section 2 does not incorporate a 'retrogression' standard" and recognizing that § 2 requires "an eye toward past practices is part and parcel of the totality of the circumstances" and that "some parts of the [Section] 2 analysis may overlap with the [Section] 5 inquiry"); *Ga. State Conf. of the NAACP v. Fayette County Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1368 n.14 (N.D. Ga. 2014) (post-*Shelby*, rejecting Defendants contention that the retrogression requirements of § 5 no longer apply and stating that "§ 5 continues to apply to court-drawn redistricting plans as it always has."). Further, as the Supreme Court specifically held in *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015), and this Court confirmed in *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, at *18-19 (E.D. Va. June 5, 2015), § 5 compliance is still a necessary consideration in every challenge to a redistricting plan enacted pre-*Shelby*, such as HB 5005.

In drawing and enacting the 2011 Plan, the House of Delegates was required to and undertook to comply with the mandates of the Fourteenth Amendments and the VRA and did not subordinate race to traditional districting factors. Plaintiffs cannot establish (1) racial gerrymandering because race was not the predominant consideration in enacting the 2011 Plan and compliance with the VRA was narrowly tailored; and (2) vote dilution because the 2011 Plan does not have a discriminatory effect and the House of Delegates did not act with a discriminatory purpose.

ISSUES TO BE PRESENTED AT TRIAL

I. Plaintiffs Must Establish Racial Gerrymandering In Violation Of The Equal Protection Clause.

It is well-settled that "reapportionment is primarily the duty and responsibility of the State" and that "the States must have discretion to exercise the political judgment necessary to balance competing interests [in electoral districting]." *Miller*, 515 U.S. at 915. A court's review of districting legislation represents a "serious intrusion" on the State's function, *id.*, and a court must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," especially where the State "has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated", *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). There is a presumption that the legislature conducts redistricting in good faith. *Miller*, 515 U.S. at 915. Plaintiffs must meet a "demanding" burden to overcome this presumption. *Easley*, 532 U.S. at 241.

To trigger strict scrutiny, plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race. *Miller*, 515 U.S. at 916. If plaintiffs meet their burden, strict scrutiny is triggered and the burden of production then shifts to defendants. Defendants can justify any race-based legislation by showing that the redistricting legislation is narrowly tailored to achieve a compelling state interest. *Miller*, 515 U.S. at 920. The Supreme Court has assumed, without deciding,

that compliance with the VRA is a compelling state interest. *Bush*, 517 U.S. at 977 ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . can be a compelling state interest."); *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) ("We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest . . . ."). A racial gerrymandering claim must be strictly scrutinized district-by-district. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1265.

In this case, Plaintiffs will attempt to show that race predominated through the House of Delegates' application of a 55% black voting age population ("BVAP") floor in drawing the 12 Challenged Districts, and that the 2011 Plan was not narrowly tailored because the House of Delegates failed to conduct a racial bloc voting analysis[6] to determine the appropriate BVAP level. However, Plaintiffs themselves concede that no Court has ever required a redistricting body to conduct such an analysis in order to satisfy the narrow tailoring requirement. *See* Dckt No. 70.

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[6] "A racial bloc voting analysis, which legislatures frequently use in redistricting, studies the electoral behavior of minority voters and ascertains how many African-American voters are needed in a congressional district to avoid diminishing minority voters' ability to elect their candidates of choice." *Page*, 2015 U.S. Dist. LEXIS 73514, at *13.

A. Plaintiffs Must Prove that Race Predominated and the House of Delegates Subordinated Traditional Redistricting Principles to Race in Enacting the 2011 Plan.

To trigger strict scrutiny, Plaintiffs first must show that race was the House of Delegates' *predominant* consideration in drawing the electoral boundaries of each of the Challenged Districts. Plaintiffs must establish that a facially neutral law was "motivated by a racial purpose or object," or that it is "unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Plaintiffs must prove that other, legitimate districting principles were "'subordinated' to race"; in other words, race must not simply have been a motivation: "race must be 'the predominant factor motivating the legislature's [redistricting] decision.'" *Bush*, 517 U.S. at 959 (citations omitted). Plaintiffs will only meet this burden

> either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Miller, 515 U.S. at 916. To make this showing, a plaintiff must prove that the legislature subordinated all traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency

protection, and political affiliation, to racial considerations. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1270 (citing *Bush*, 517 U.S. at 964, 968). The equal population goal, although mandated by the Equal Protection Clause, "is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries." *Id.*

After receiving the 2010 census data, the House Committee on Privileges and Elections established various guidelines to govern the House of Delegates' redistricting process, which included compliance with population equality principles based on the 2010 census data, federal and state constitutional requirements, the VRA, and traditional redistricting factors such as contiguity, compactness, and communities of interest.

From 2000 to 2010, Virginia's overall population grew at a rate of 13%. Attachment 5. The pattern of growth was uneven across the Commonwealth. Department of Justice Submission Attachment 3–Statement of Change (hereinafter "Attachment 3"). The data also showed that Virginia's African-American population grew at a rate of 11.6%, and in the case of the Challenged Districts, the 2010 census data showed that most of the 12 districts experienced growth rates well below the state average or, in a few cases, actually lost population over the decade. Attachment 5. In fact, one of the Challenged Districts, district 71, had such a dramatic change in population and demographics that in 2011, prior to the passage of HB 5005, African-Americans no longer constituted a majority of the voters in that District. Attachment 5,

Table 5.1. Eleven of the 12 majority African-American districts in the prior plan were below the ideal population by a total of 79,310 and only one of these districts was above the ideal population by 143. Attachment 17.

Consistent with the House Committee on Privileges and Elections guidelines and in light of population growth that was unevenly distributed, the General Assembly redrew Virginia's 100 House of Delegates districts to accommodate population shifts, "either to bring the district itself into conformity with population criteria or to facilitate necessary changes in adjoining districts." Attachment 3. Despite demographic changes resulting in the loss of population in the Challenged Districts, the 2011 Plan retained the same number of majority African-American districts as the Commonwealth's prior plan.

To comply with the equal population principle mandated by the Fourteenth Amendment and the House Committee on Privileges and Elections resolution, the 2011 Plan had a deviation range of +1.0% to -1.0%. Attachment 3. To comply with the VRA, as set forth in more detail below, the 2011 Plan retained 12 majority African-American districts, with BVAP levels ranging from 55.2% to 60.7%. *Id.* The House of Delegates heard, considered, and balanced many points of view on communities of interest, including those defined by "geographic features such as mountain ranges and valleys, by economic character, by social and cultural attributes, and by services." Attachment 3. Moreover, partisan and incumbency considerations were factors that influenced the drawing of the 2011 Plan. *Id.* ("partisan

factors were present" and "[i]ncumbency was a consideration in redistricting"). Compactness was also a factor, and the compactness score in the 2011 Plan are comparable to the prior plan. *Id.*

Defendant-Interveners will go through each of the Challenged Districts to explain how the boundaries were drawn. For each Challenged District, Defendant-Interveners will present evidence showing that racial considerations did not predominate or control the traditional redistricting considerations that the House of Delegates considered, including political factors, maintaining the status quo, incumbency protection, and compactness and contiguity. Instead, race was merely a factor used to ensure compliance with the equal population goal and the VRA.[7]

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[7] As Judge Payne recognized in his dissenting opinion upon remand in *Page*,

> To construe a legislator's (or the legislature's) acknowledgement of the r[illegible] of the Supremacy Clause as a de facto trigger for s[illegible]ict scrutiny of majority-minority jurisdictions is to place the legislatures and their legislators in a 'trap[] between the competing hazards of liability.'" *Bush*, 517 U.S. at 992 (O'Connor, J., concurring)). Such an interpretation implies that legislatures are always subject to strict scrutiny.

Page, 2015 U.S. Dist. LEXIS 73514, at * at 81 (Payne, J., dissenting). Instead, racial predominance requires "*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that *per force* results in the conclusion that the traditional criteria have been subordinated to race." *Id.* at *72 (Payne, J., dissenting) (emphasis added).

B. Assuming that Plaintiffs Can Establish that Race Predominated, the 2011 Plan Survives Strict Scrutiny Because It Is Narrowly Tailored to Comply with the VRA.

Plaintiffs will argue that the 2011 Plan was not narrowly tailored because of the application of a "mechanical" quota–a 55% BVAP floor, and the House of Delegates' failure to conduct a racial bloc analysis.

In *Ala. Legis. Black Caucus*, the Supreme Court recognized that a "mechanical interpretation" of § 5 can raise "serious constitutional concerns." *Ala. Legis. Black Caucus*, 135 S. Ct. at 1273. However, the Supreme Court also recognized that:

> we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population §5 demands. . . . The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few.

Id. at 1273-74. Instead, Supreme Court merely reiterated that to pass strict scrutiny, "*the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice . . . .*" *Id.* at 1274 (emphasis added). The

narrow tailoring requirement may be met "*even if a court does not find that the actions were necessary for statutory compliance.*" *Id.* (emphasis added).

Further, at the June 4, 2015 Pretrial Conference, the Plaintiffs themselves conceded that no court has ever required a redistricting body to conduct a racial bloc voting analysis in order to satisfy the narrow tailoring requirement of the Equal Protection Clause. Dckt. No. 70. Indeed, this Court recently rejected such a claim. *See Page*, 2015 U.S. Dist. LEXIS 73514, at *57 n.29 ("[W]hile the legislature did not conduct a racial bloc voting analysis in enacting the 2012 Plan, we do not find that one is always necessary to support a narrow tailoring argument.").

1. **Compliance with the VRA required the House of Delegates to retain 12 majority African-American districts in the 2011 Plan.**

Compliance with § 5's non-retrogression principle required that the House of Delegates retain 12 majority African-American districts. The non-retrogression principle is satisfied if "minority voters retain the ability to elect their preferred candidates of choice." *Ala. Legis. Black Caucus*, 135 S. Ct. at 1273. A state is not required to maintain the same minority population percentages as in the prior plan, *id.*, nor is it required to increase the number of majority minority districts in order to ensure the electoral success of the minority voters, *see Bush*, 517 U.S. at 983 ("Non-retrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's *opportunity* to elect representatives of its

choice not be diminished, directly or indirectly, by the State's actions.") (emphasis in original). Thus, a plan that keeps the same levels of voting effectiveness by retaining the same number of majority minority districts is not retrogressive. *See City of Richmond v. United States*, 422 U.S. 358, 388 (1975) (Brennan, J., dissenting) ("[The] fundamental objective of § 5 [is] the protection of *present* levels of voting effectiveness for the black population") (emphasis in original); H.D. 2011 Spec. Sess. I, at 63 (statement of Del. Armstrong) (discussing that the VRA requires that Virginia maintain, to the extent possible, all of its minority/majority districts.).

In determining what is required to avoid retrogression, Congress expressly rejected the Supreme Court's holding in *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003), which held that § 5 may be satisfied through the creation of influence or coalition districts.[8] Instead, Congress accepted the views in Justice Souter's dissent and amended the VRA accordingly in 2006. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274, 1287. The 2006 amendments to § 5 prohibit voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or

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[8] A coalition district consists of a district in which minority voters do not consist of a majority but form coalitions with minority voters from other racial and ethnic groups in order to elect candidates of their choice. *Georgia*, 539 U.S. at 481. Influence districts are districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482.

language minority status, "to elect their preferred candidates of choice." 52 U.S.C. § 10304(b)-(d).

Consistent with these requirements, the House of Delegates sought and received preclearance of the 2011 Plan from the U.S. Attorney General who found that the 2011 Plan did not result in any retrogression in the ability of minorities to elect their candidates of choice. The materials submitted to the U.S. Attorney General in the § 5 submission establish a "strong basis in evidence" in support of the House of Delegates' decision to retain 12 majority African-American districts. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274.

The § 5 submission showed that under the official 2010 census data, from 2000 to 2010, Virginia's African-American population increased at a growth rate of 11.6% (less than the Commonwealth's overall population growth rate of 13%) and changed from 19.6% to 19.4% of the total population. Attachment 5. In the case of the 12 districts that had a majority African-American voting age population after the 2001 redistricting, the 2010 data showed that most of those districts experienced growth rates well below the state average or, in a few cases, actually lost population over the decade. *Id.* The below average growth and population decline left 10 of the 12 majority minority districts significantly below ideal district size. *Id.*

To comply with § 5, the 2011 Plan retained each of the 12 majority African-American districts, even though the total and voting age minority percentage was reduced in half of the districts due to demographic trends from the last decade. *Id.* Due to these uneven population shifts, the 2011 Plan reduced the African-

American total and voting age percentages in five of the 12 districts (districts 69, 70, 71, 74, 75) while the African-American total and voting age percentages were increased in the remaining seven districts (districts 63, 77, 80, 89, 90, 92, 95). *Id.*

2. The Challenged Districts have a minimum BVAP level of 55% to provide African-American voters "the ability to elect a representative of their choice."

The obligation to allow African-American voters "the ability to elect a representative of their choice" required the Challenged Districts to maintain, at the very minimum, a simple majority BVAP level consisting of 50% plus one voter. 52 U.S.C. § 10301(b); *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

In *Bartlett v. Strickland*, the Supreme Court found that "§ 2 can require the creation of [a majority-minority district,]" which consists of "a minority group compose[d of] a numerical, working majority of the voting-age population." 556 U.S. at 13. There, the Court expressly rejected the state's claim that a crossover district[9] was sufficient to establish vote dilution under § 2. *Id.* at 17. Instead, the Supreme Court applied the majority-minority rule, which relies on an objective, numerical test: "Do minorities make

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[9] A crossover district is a district where "minority voters make up less than a majority of the voting-age population . . . . [b]ut . . . is [potentially] large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13. The Supreme Court has used the terms "crossover" and "coalitional" districts interchangeably. *Id.*

up more than 50 percent of the voting-age population in the relevant geographic area?" *Id.* at 18. Numerous courts have required majority-minority districts to consist of a minority voting population ("MVAP") of greater than 50%. *Id.* at 19 (and cases cited therein).[10] Thus, the House of Delegates was required to maintain, at a minimum, a BVAP level greater than 50%.

Although a simple majority is all that is required under *Bartlett*, courts have found that more than a simple majority is often necessary to ensure minority voters' ability to elect their candidate of choice. Factors such as minority population voter registration, whether persons within the population are eligible to vote, turn out, and population makeup often require a MVAP level of 60-65%. *See Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984) (discussing

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[10] *See also Gonzalez v. Harris County*, 601 Fed. Appx. 255 (5th Cir. 2015); *Pope v. County of Albany*, 687 F.3d 565, 577 (2d Cir. 2012); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1117 (5th Cir. 1991); *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991); *Rossito-Canty v. Cuomo*, No. 15-CV-0568, 2015 U.S. Dist. LEXIS 18796, at *24 (E.D.N.Y. Feb. 16, 2015); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wash. 2014); *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086, at *12 (N.D. Tex. Aug. 2, 2012); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011); *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 456 (N.D. Tex. 2010); *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio 2003); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 03-CV-502 (NAM/DRH), 2003 U.S. Dist. LEXIS 11386, at *16 (N.D.N.Y July 7, 2003).

guideline of 65% MVAP which consists of 15% total increment to simple majority based on 5% increase for young population, low voter registration, and low voter turn-out); *NAACP v. Austin*, 857 F. Supp. 560, 575 n.13 (E.D. Mich. 1994) (". . .60% may be more appropriate than 65% as a rough benchmark for assessing the electoral effectiveness of majority-black districts."); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1198 (E.D. Ark. 1990) ("something on the order of a 60% BVAP is required to remedy a vote-dilution violation of the Voting Rights Act."); *Smith v. Clinton*, 687 F. Supp. 1361, 1363 (E.D. Ark. 1988) ("A guideline of 65% of total population is frequently used, and is derived by supplementing a simple majority with an additional 5% to offset the fact that minority population tends to be younger than that of whites, 5% for the well-documented pattern of low voter registration, and 5% for low voter turnout among minorities. When voting-age population figures are used, a 60% nonwhite majority is appropriate."). Indeed, in fashioning remedial plans for § 2 violations, courts have applied guidelines as high as 65% MVAP to ensure that the minority population had the ability to elect the candidate of their choice. *See Neal v. Coleburn*, 689 F. Supp. 1426, 1438 (E.D. Va. 1988) ("Thus, the 65% figure is an approximation of the type of corrective super-majority that may be needed in any particular case."); *Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) (affirming remedial plan affording more than a 65% and 74% MVAP in contested districts).

At trial, the Defendant-Interveners will present evidence showing that the House of Delegates discussed concerns that a simple majority BVAP level

was insufficient to provide African-Americans "the ability to elect a candidate of their choice" in certain Challenged Districts. During the special session, the delegates discussed concerns that a simple majority would not be enough to provide African-American voters the opportunity to elect their preferred candidate of choice. H.D. 2011 Spec. Sess. I, at 65 (Va. April 5, 2011) (statement of Del. Jones). Delegate Jones also testified that he did not believe that the creation of a 13th majority African-American district would receive preclearance by the U.S. Attorney General or otherwise comply with the VRA. *Id.* at 69-70. Delegate Tyler (75th district), who ended up opposing the vote, testified that voter eligibility was of serious concern to her, as she had several prison facilities in her district which artificially inflated the BVAP level in her district. H.D. 2011 Spec. Sess. I, at 38-39 (Va. April 27, 2011) (statement of Del. Tyler). Delegate Tyler expressed serious concerns that the African-American community could not elect the candidate of its choice with a BVAP level lower than 55%. *Id.* To determine the appropriate BVAP level in each Challenged District, the House of Delegates took into account African-Americans' voter registration and voter turnout, which affected their ability to elect their candidate of choice. H.D. 2011 Spec. Sess. I, at 41-42 (Va. April 5, 2011) (statement of Del. Jones).

Accordingly, the 55% BVAP level was not an arbitrary quota unsupported by evidence. Instead, there will be a basis in evidence to support the BVAP level in each Challenged District.

II. Plaintiffs Must Establish Vote Dilution Under The Equal Protection Clause Of The Fourteenth Amendment.

Plaintiffs may claim that the House of Delegates' failure to create a 13th majority African-American district resulted in unconstitutional packing of African-American voters in the Challenged Districts, thereby diluting African-American voting strength.[11]

The essence of a vote dilution claim under the Fourteenth Amendment is "that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.'"[12] *Miller*, 515 U.S. at 911 (citation omitted). Claims of racially discriminatory vote dilution "can only be established by proof (a) that vote dilution, as a special form of discriminatory effect, exists and (b) that it results from a racially discriminatory purpose chargeable to the state. *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1977).

"The first inquiry in assessing proof of a vote dilution claim is whether there is–without regard to motivating purpose–a discriminatory 'effect' traceable to the challenged state action." *Washington*, 664 F.2d

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[11] A typical packing claim consists of minorities that are swept out of surrounding districts and concentrated into the packed districts. Here, the districts surrounding the Challenged Districts consist of African-American influence districts. *See* DOJ Submission–Attachment 10: 2011 House Maps.

[12] A claim of racial gerrymandering as recognized in *Shaw I*, 509 U.S. at 652 is "analytically distinct" from a vote dilution claim. *Miller*, 515 U.S. at 911.

at 919. To prove discriminatory effect, a plaintiff must show that the redistricting scheme impermissibly dilutes the voting rights of the racial minority. *Id.* Generally, this requires proof that the racial minority's voting potential has been minimized or cancelled out or the political strength of such a group has been adversely affected. *Id.* (citing *Mobile*, 446 U.S. at 66 (1980)). The following factors indicate a discriminatory effect: bare electoral defeat, disproportionate representation,

> lack of access to the process of slating candidates, the unresponsiveness of legislators to (the racial minority's) particularized interests, a tenuous state policy underlying the preference for . . . at-large districting, . . . the existence of past discrimination in general (precluding) the effective participation in the election system . . . (and such 'enhancing' factors as) large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.

Id. at 920 (citing *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976)). Plaintiffs alleging vote dilution must offer "a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). Here, there is no evidence to establish any of the factors related to discriminatory effect.

More importantly, Plaintiffs will not offer an alternative voting practice to serve as the benchmark "undiluted" voting practice.

To prove discriminatory purpose, the plaintiff must establish "that the disputed plan was 'conceived or operated as (a) purposeful (device) to further racial . . . discrimination.'" *Washington*, 664 F.2d at 920 (quoting *Mobile*, 446 U.S. at 66). Here, there is no allegation nor any evidence that the 2011 Plan was conceived or operated purposefully to further racial discrimination. Moreover, neither the VRA nor the U.S. Constitution requires "a districting plan that maximizes black political power or influence." *NAACP*, 857 F. Supp. at 578. And, even assuming that the House of Delegates did not draw the maximum number of majority African-American districts, such a fact is insufficient to prove intentional, unconstitutional discrimination. *Id.* (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-81 (1979)). Accordingly, Plaintiffs cannot establish a claim of vote dilution in the form of unconstitutional packing in violation of the Equal Protection Clause.

CONCLUSION

As required by *Ala. Legis. Black Caucus*, this Court must review each and every one of the 12 Challenged Districts separately and independently to determine if the district in question was improperly racially gerrymandered. In this case, the Plaintiffs will not be able to show that race predominated over all other factors in the drawing of HB 5005 and the Challenged Districts. Further, the evidence will show that as required by both federal law and the law of the Commonwealth, the House of Delegates undertook to

comply with the mandates of the VRA and to the extent that race was a consideration in drawing the borders of the 12 Challenged Districts, such a consideration was narrowly tailored to support a compelling state interest. The House of Delegates took into account all traditional redistricting considerations and thus there is a substantial basis in evidence for such racial considerations. Accordingly, this Court should affirm HB 5005 and grant judgment in favor of the Defendants.

Dated: June 19, 2015

By: */s/ Jeffrey P. Brundage*

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Order (Aug. 7, 2018)
(ECF 250)

It appearing that Defendant-Intervenor William J. Howell is no longer the Speaker of the House of Delegates, that Defendant-Intervenors' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (ECF No. 236) was filed on behalf of the present Speaker of the House of Delegates, M. Kirkland Cox, who has not been made a party to this case, and that Defendant-Intervenors' subsequent motions and papers inconsistently have been filed on behalf of M. Kirkland Cox and William J. Howell, *see* DEFENDANT-INTERVENORS' MOTION TO STAY INJUNCTION PENDING APPEAL UNDER 28 U.S.C. § 1253 (ECF No. 237); REPLY BRIEF IN SUPPORT OF MOTION FOR STAY (ECF No. 249), Defendant-Intervenors are hereby advised that appropriate steps must be taken forthwith to ensure that the proper persons, and only such persons, are designated as parties to this action.

It is so ORDERED.

/s/ [handwritten: REP]
Robert E. Payne
Senior United States District Judge For the Court

Richmond, Virginia
Date: August 7, 2018

Notice of Substitution Under Rule 25(d)
(Aug. 8, 2018)
(ECF 251)

Please take notice that, under Federal Rule of Civil Procedure 25(d), M. Kirkland Cox has been substituted for William J. Howell as a Defendant-Intervenor in this matter. Speaker Howell participated in this matter in his capacity as Speaker of the Virginia House of Delegates, and Speaker Cox assumed that office in January 2018. By operation of Rule 25(d), Speaker Cox was "automatically substituted as a party." Fed. R. Civ. P. 25(d); *Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985) ("replacement of the named official will result in automatic substitution of the official's successor in office"). Accordingly, Speaker Cox is a Defendant-Intervenor, and Speaker Howell is no longer a party in any capacity.

Counsel for Defendant-Intervenors apologize for inaccurate references to Speaker Howell in post-January 2018 briefing. They respectfully observe, however, that "any misnomer not affecting the parties' substantial rights must be disregarded." Fed. R. Civ. P. 25(d).

Dated: August 8, 2018

Respectfully Submitted,

/s/ Katherine L. McKnight

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